



Western
Australian
Government

Gazette

ISSN 2204-4264 (online)

1371

PERTH, TUESDAY, 30 MAY 2023 No. 64 SPECIAL

PUBLISHED BY AUTHORITY GEOFF O. LAWN, GOVERNMENT PRINTER

© STATE OF WESTERN AUSTRALIA

ABORIGINAL CULTURAL HERITAGE ACT 2021

ABORIGINAL CULTURAL HERITAGE ACT 2021 STATUTORY GUIDELINES

ACH MANAGEMENT CODE

Commencement

The ACH management code comes into effect on the 1 July 2023.

Overview

Introduction

The *Aboriginal Cultural Heritage Act 2021* (Act) recognises, protects, conserves, and preserves Aboriginal cultural heritage (ACH), and recognises the fundamental importance of ACH to Aboriginal people and its role in Aboriginal communities past, present and future. The Act recognises the value of ACH to Aboriginal people as well as to the wider Western Australian community.

One of the key principles of the Act relating to the management of activities that may harm ACH is that, as far as practicable, utilise land for the optimum benefit of the people of Western Australia, the values held by Aboriginal people in relation to ACH should be prioritised when managing activities that may harm ACH.

Where an activity that may harm ACH is proposed to be carried out, a due diligence assessment (DDA) is required to be undertaken (other than for exempt activities) to assess the risk of harm to ACH to enable a proponent to determine how to proceed in relation to the proposed activity.

A DDA must be undertaken in accordance with this Code.

Purpose

This Code sets out how a DDA is to be undertaken by a person proposing to carry out an activity. Undertaking a DDA is required to determine whether—

- the activity is in a protected area;
- there is any ACH located within an activity area;
- the activity should be carried out in such a way, such as using an alternative location or alternative method, to avoid harming ACH, and can therefore be carried out without any authorisation;
- authorisation is required for the proposed activity, which may require—
 - taking reasonable steps to avoid or minimise harm;
 - an ACH permit (Permit); or
 - an ACH management plan (Plan);
- engagement, and what type of engagement, with Aboriginal parties is required.

Undertaking a DDA in accordance with the Code may be used as a defence to the charge of an offence that an activity harmed ACH [s. 98].

Legislative context

Aboriginal cultural heritage is defined in section 12 of the Act as—

Aboriginal cultural heritage—

- (a) means the tangible and intangible elements that are important to the Aboriginal people of the State, and are recognised through social, spiritual, historical, scientific or aesthetic values, as part of Aboriginal tradition; and
- (b) includes the following—
 - (i) an area (an **Aboriginal place**) in which tangible elements of Aboriginal cultural heritage are present;
 - (ii) an object (an **Aboriginal object**) that is a tangible element of Aboriginal cultural heritage;
 - (iii) a group of areas (a **cultural landscape**) interconnected through tangible or intangible elements of Aboriginal cultural heritage;
 - (iv) the bodily remains of a deceased Aboriginal person (**Aboriginal ancestral remains**), other than remains that are buried in a cemetery where non-Aboriginal persons are also buried or remains that have been dealt with or are to be dealt with under a law of the State relating to the burial of the bodies of deceased persons.

Section 102 provides that a DDA, undertaken in accordance with this Code, is an assessment about—

- (a) whether the area of the proposed activity includes any area that is part of a protected area;
- (b) whether the proposed activity is a—
 - (i) a tier 1 activity (no or minimal ground disturbance);
 - (ii) a tier 2 activity (low ground disturbance);
 - (iii) a tier 3 activity (moderate to high ground disturbance);
- (c) whether Aboriginal cultural heritage is located in the area where it is intended that the proposed activity be carried out;
- (d) whether there is a risk of harm being caused to ACH by the proposed activity;
- (e) in relation to a tier 2 activity or a tier 3 activity—the identity of the persons to be notified or the persons to be consulted about the proposed activity.

Section 90 provides that to *harm* ACH includes to destroy or damage ACH comprising—

- Aboriginal places,
- Aboriginal objects,
- Aboriginal ancestral remains and
- ACH (including cultural landscapes) located within protected areas.

An act carried out by an Aboriginal person in accordance with their traditional rights, interests, and responsibilities in relation to ACH is not considered harm to that ACH [s. 90].

Related Agreements

Steps taken under a related agreement [s. 106] can be used to satisfy the due diligence assessment referred to in section 102(c) or (d) in relation to a proposed activity that the proponent intends to carry out in the area in relation to—

- identifying whether ACH is located within an Activity area; or
- assessing whether there is a risk of harm being caused to ACH.

A related agreement is an agreement that contains provisions about—

- (i) the management of ACH in an area; and
- (ii) the carrying out of an activity to which authorisation under Part 6 is required.

and is between a proponent for the activity being, or a proposed activity intended to be, carried out in the area and—

- (i) a person who is an Aboriginal party to an approved or authorised Plan; or
- (ii) a person who is, or would be an interested Aboriginal party for the Plan; or
- (iii) one or more of the persons to be notified or the persons to be consulted about those activities, or proposed activities.

Appendix 3 sets out the process for engagement (notification or consultation) with Aboriginal people subsequent to the DDA process.

Exempt activities

Exempt activities are set out in the Act and the *Aboriginal Cultural Heritage Regulations 2022* (Regulations). An exempt activity that may harm ACH may be carried out provided it is not within a protected area (see the Directory) or is permitted by any conditions or regulations associated with a protected area. A DDA is not required. Advice should be sought from the Department as to whether the proposed activity is permitted.

Consistent with the objects and principles of the Act, exempt activities are encouraged to be undertaken in a manner that avoids or minimises harm to ACH.

Part A Undertaking a Due Diligence Assessment

Background to the DDA

Who should undertake a DDA?

It is a proponent's responsibility to undertake a DDA [s. 105].

When should a DDA commence?

It is recommended a DDA is undertaken as early as possible, particularly for tier 2 and tier 3 activities, when planning to carry out an activity, to allow the proponent to plan the proposed activity to avoid or minimise the risk of harm to ACH where practicable. The DDA process involves an assessment of, among other things, whether ACH is present in the activity area and whether there is a risk of harm to ACH caused by the proposed activity.

Over what area should a DDA be undertaken

A DDA is to be carried out in relation to the activity area.

Undertaking a DDA over as broad an area as practicable where the activity potentially may be carried out will assist in planning the activity to avoid or minimise harm to ACH.

Where ACH is located in the activity area and the activity is able to be altered or moved to avoid that ACH, the DDA will also need to include the area of the altered or moved activity.

DDA is not an approval to harm ACH

Under the Act, to *harm* ACH includes to destroy or damage ACH [s. 90].

A completed DDA is not itself an approval to harm ACH.

Where the DDA identifies that no ACH is present or that, where ACH is present, there is no risk of harm to ACH, the activity can be carried out without authorisation provided that all reasonable steps possible are taken to avoid or mitigate the risk of harm to ACH by the activity, including harm to ACH the proponent becomes aware of after undertaking the DDA.

Where the DDA identifies that ACH is present and that there is a risk of harm to ACH, authorisation is required under Part 6 of the Act.

Where a proponent becomes aware of new information about ACH in the area for which they have an authorisation, they are required by the Act to notify the Council [ss 128, 153, 167].

Due Diligence Assessment

Assessing whether the proposed activity is located within any part of a protected area—section 102(a)

The purpose of declaring a protected area [s. 70] is to—

- (a) recognise that there is ACH of outstanding significance in the area; and
 (b) provide special protection for that area from activities that may harm ACH.

Any activity, regardless of whether it is exempt, tier 1, tier 2 or tier 3, that may harm ACH can only lawfully be carried out within any part of a protected area where it is permitted by the conditions or regulations applicable to the protected area in question.

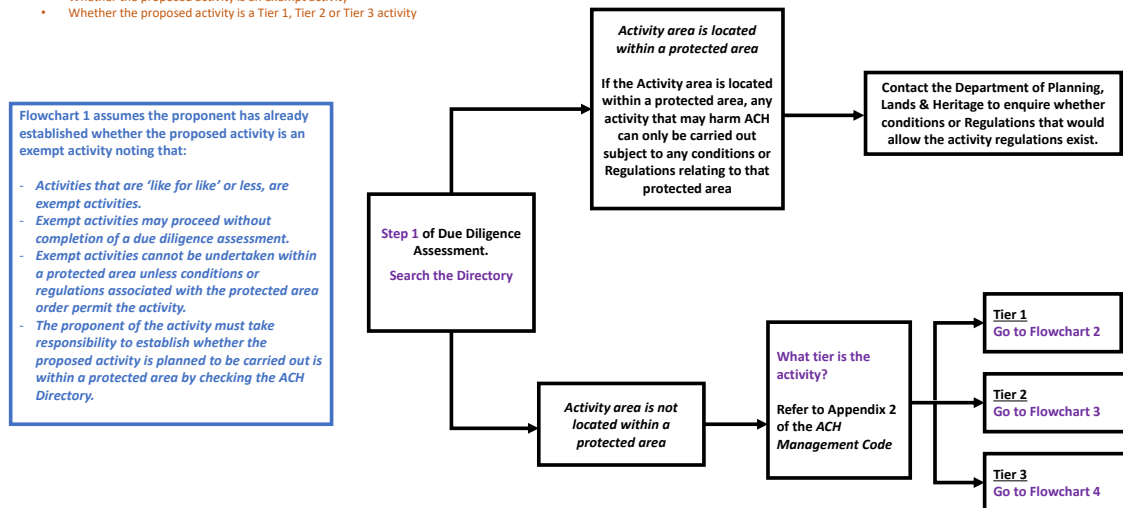
Table 1 and Flowchart 1 set out the steps required to assess whether an activity is located within any part of a protected area.

	Steps for assessing whether the Activity area is located within the any part of a protected area [s. 102(a)]	Supporting information/required action
Step 1	Search the Directory. ¹	All protected areas, including relevant conditions and regulations, are listed on the Directory.
Step 2	If the Activity area is not located within a protected area continue with the DDA.	Continue to 5.2 below
Step 3	If the Activity area is located within a protected area, any activity that may harm ACH can only be carried out subject to any conditions or regulations relating to that protected area.	The Department of Planning, Lands & Heritage (Department) can be contacted to enquire whether any conditions or regulations exist that would allow the activity.

Table 1—Determining whether proposed activity is within a protected area.

Flowchart 1 – Commencement of Due Diligence Assessment

- Whether there is a Protected Area
- Whether the proposed activity is an exempt activity
- Whether the proposed activity is a Tier 1, Tier 2 or Tier 3 activity



Assessing the tier of an activity—section 102(b)

The activity tier of the proposed activity can be assessed by referring to the *Table of Activity Tiers* set out in **Appendix 1** of this Code or in the Regulations. The Department can be contacted for advice to confirm in which tier the proposed activity falls.

Once it has been determined in which tier the proposed activity falls, a DDA must be undertaken by following the requirements for the relevant tier—

- (a) tier 1 activity—see section 5.3;
 (b) tier 2 activity—see section 5.4;
 (c) tier 3 activity—see section 5.5.

Where a proposed activity may harm ACH, the authorisation pathway corresponding to the relevant tier must be followed (see Table 2).

Activity Category	Authorisation requirements if activity may harm ACH
Tier 1 activity	All reasonable steps possible taken to avoid or minimise the risk of harm
Tier 2 activity	Permit or an approved or authorised Plan
Tier 3 activity	Approved or authorised Plan

Table 2—Overview of authorisation process for activity tiers

Tier 1 activity—DDA requirements

Under section 110 of the Act, a tier 1 activity that may harm ACH is authorised if—

- (a) the activity is a tier 1 activity; and

¹ Additional information will be made available as to how to undertake a mapping analysis

- (b) the area where the activity is carried out does not include any area that is part of a protected area; and
- (c) a due diligence assessment is undertaken in relation to the carrying out of the activity; and
- (d) the person takes all reasonable steps to avoid, or minimise harm to ACH by the activity.

Table 3 and Flowchart 2 outline the DDA process for a tier 1 activity.

As referred to under section 3 **Legislative context**, steps taken under a related agreement can be used to satisfy the due diligence assessment referred to in section 102(c) or (d).

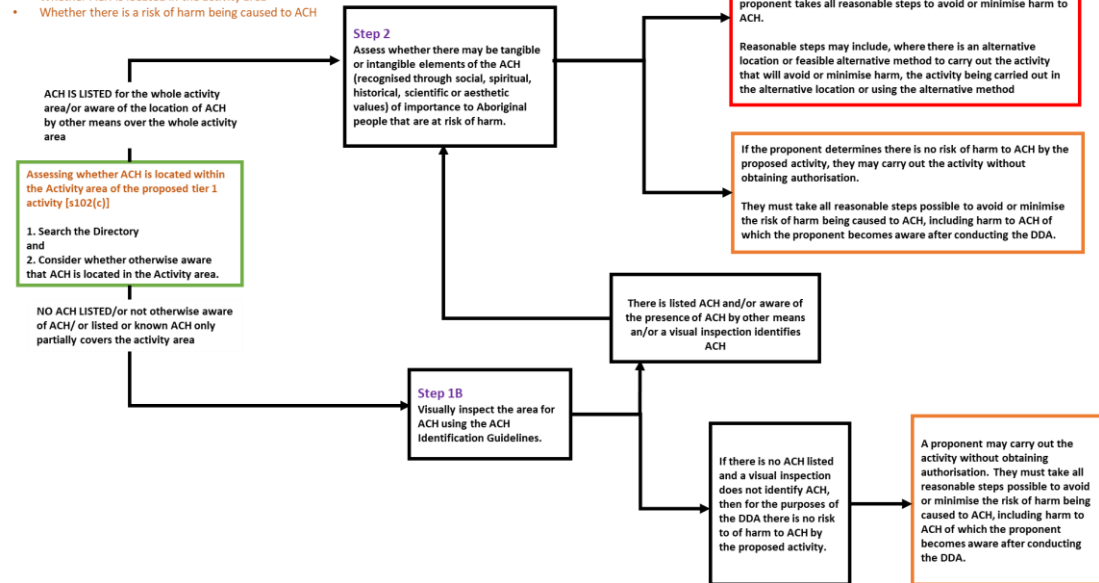
Tier 1 Activity	Steps for undertaking a DDA for a tier 1 activity	Supporting information/Required Action
Step 1A	<p>Assessing whether ACH is located within the activity area of the proposed tier 1 activity [s. 102(c)]</p> <ol style="list-style-type: none"> Search the Directory and Consider whether you are otherwise aware that ACH is located in the activity area. 	<p><i>Link to the Directory to be included</i></p> <p>If—</p> <ul style="list-style-type: none"> there is no ACH listed; or the listed ACH only partially covers the activity area; or you are otherwise aware that there is ACH that only partially covers the activity area; <p>proceed to Step 1B.</p> <p>If—</p> <ul style="list-style-type: none"> there is ACH listed on the Directory; or you are otherwise aware that there is ACH; <p>for the whole of the activity area, proceed to Step 2</p>
Step 1B	<p>Visually inspect the area for ACH as close in time as is practical to carrying out the activity.</p> <p>A visual inspection does not require mechanical or electronic assistance and is reasonable or practicable.</p> <p><i>The ACH Identification Guidelines are able to be referred to for assistance.</i></p>	<p>If—</p> <ul style="list-style-type: none"> there is listed ACH; or you are otherwise aware that there is ACH; or a visual inspection identifies ACH (whether the same as, or different to, the ACH identified in Step 1A), <p>proceed to Step 2.</p> <p>If—</p> <ul style="list-style-type: none"> there is no ACH listed; and you are otherwise not aware that there is ACH; and a visual inspection does not identify ACH; <p>then, for the purposes of the DDA, there is no ACH located in the activity area and no risk of harm.</p> <p>You may carry out the activity without obtaining authorisation, however, you must take all reasonable steps possible to avoid or minimise the risk of harm being caused to the ACH, including harm to ACH you become aware of after undertaking the DDA.</p>
Step 2	<p>Assess whether there is a risk of harm being caused to ACH by the proposed activity [s. 102(d)]</p> <p>Assess whether there may be any tangible or intangible elements of the ACH (recognised through social, spiritual, historical, scientific or aesthetic values) of importance to Aboriginal people that are at risk of harm.</p>	<p>If you are aware, or uncertain as to whether, there may be a risk of harm, the activity can be carried out provided you take all reasonable steps to avoid or minimise harm to ACH.</p> <p>Reasonable steps may include, where there is an alternative location or feasible alternative method to carry out the activity that will avoid or minimise harm, the activity being carried out in the alternative location or using the alternative method (provided you have undertaken a DDA that covers that alternative method or location).</p> <p>If you determine that there is no risk of harm, you may carry out the activity without obtaining authorisation. You must take all reasonable steps possible to avoid or minimise the risk of harm being caused to the ACH, including harm to ACH which you become aware of after undertaking the DDA.</p>

Table 3—Steps for undertaking a DDA for a tier 1 activity [s. 110]

Records should be kept of all the steps undertaken in the DDA process, including the basis for any decision that there isn't a risk of harm.

Flowchart 2 – Due Diligence Assessment for Tier 1 Activities

- Whether ACH is located in the activity area
- Whether there is a risk of harm being caused to ACH



Tier 2 activity—steps to undertake a DDA

Under section 111 of the Act, a tier 2 activity that may harm ACH is authorised if—

- the activity is a tier 2 activity; and
- the area where the activity is carried out does not include any area that is part of a protected area; and
- a due diligence assessment is undertaken in relation to the carrying out of the activity; and
- the person carries out the activity in accordance with—
 - an ACH permit; or
 - an approved or authorised ACH management plan.

Table 4 and Flowchart 3 outline the DDA process for a tier 2 activity.

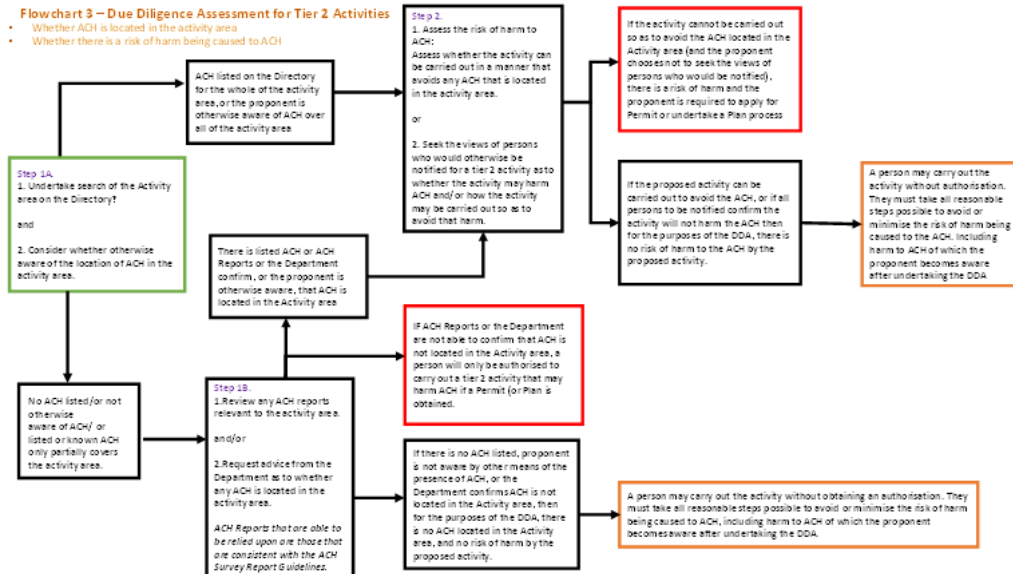
As referred to under section 3 **Legislative context**, steps taken under a related agreement can be used to satisfy the DDA referred to in section 102(c) or (d).

Tier 2 Activity	Steps for undertaking a DDA for a tier 2 activity	Supporting information/required action
Step 1A	<p>Assess whether ACH is located in the activity area of the proposed tier 2 activity [s. 102(c)]</p> <ol style="list-style-type: none"> Search the Directory and Consider whether you are otherwise aware that ACH is located in the Activity area. 	<p><i>Link to the Directory to be included</i></p> <p>If—</p> <ul style="list-style-type: none"> there is no ACH listed; or the listed ACH only partially covers the Activity area; or you are otherwise aware that there is ACH that only partially covers the Activity area; <p>proceed to Step 1B.</p> <p>If—</p> <ul style="list-style-type: none"> there is ACH listed; or you are otherwise aware there is ACH; for the whole of the Activity area, <p>proceed to Step 2.</p>
Step 1B	<ol style="list-style-type: none"> Review any ACH Reports relevant to the Activity area². Request advice from the Department as to whether any ACH (in addition to that listed on the Directory) is located in the Activity area. <p>Relevant ACH Reports can include reports that aren't on the Directory.</p>	<p>If—</p> <ul style="list-style-type: none"> there is listed ACH; or you are otherwise aware that there is ACH; or ACH Reports or the Department confirm that ACH is located in the activity area; <p>proceed to Step 2.</p> <p>If—</p> <ul style="list-style-type: none"> there is no ACH listed; and

² ACH Reports will need to cover the entire area of the Activity area for it to be confirmed there is no ACH.

		<ul style="list-style-type: none"> • you are otherwise not aware that there is ACH; and
	<p>ACH Reports that are consistent with the ACH Survey Report Guidelines can be relied upon for the purposes of a DDA.</p> <p>They will need cover the entire Activity area in order to confirm that there is no ACH.</p>	<ul style="list-style-type: none"> • ACH Reports or the Department confirm ACH is not located in the Activity area; <p>then for the purposes of the DDA, there is no ACH located in the activity area and no risk of harm.</p> <p>You may carry out the activity without obtaining authorisation, however, you must take all reasonable steps possible to avoid or minimise the risk of harm being caused to the ACH, including harm to ACH you become aware of after undertaking the DDA.</p> <p>If ACH Reports or the Department are not able to confirm that ACH is not located in the Activity area, you will only be authorised to carry out a tier 2 activity that may harm ACH if you obtain a Permit (or Plan).</p>
Step 2	<p>Assess whether there is a risk of harm being caused to ACH by the proposed activity [s. 102(d)]</p> <ol style="list-style-type: none"> 1. Assess whether the activity can be carried out in a manner that avoids the ACH that is located in the activity area. <p>or</p> <ol style="list-style-type: none"> 2. Seek the views of persons who would be notified for a tier 2 activity as to whether the activity may harm ACH and/or how the activity may be carried out so as to avoid that harm. 	<p>If the activity cannot be carried out so as to avoid the ACH located in the activity area (and you choose not to seek the views of persons who would be notified), there is a risk of harm and you are required to apply for a Permit or undertake a Plan process.</p> <p>If the proposed activity can be carried out to avoid the ACH, or if all persons to be notified confirm the activity will not harm the ACH, then for the purposes of the DDA there is no risk of harm.</p> <p>You may carry out the activity without obtaining authorisation, however, you must take all reasonable steps possible to avoid or minimise the risk of harm being caused to the ACH, including harm to ACH which you become aware of after undertaking the DDA.</p>
Step 3	<p>Assess the identity of persons to be notified about the proposed activity [s. 102(e)]</p> <p>The persons to be notified are—</p> <ol style="list-style-type: none"> (a) each LACHS (b) if there is not a LACHS— <ol style="list-style-type: none"> (i) each native title party for the area; and (ii) each knowledge holder for the area; (c) if there is not a LACHS or native title party or knowledge holder, then each NTRB. 	<p>The Directory contains information on—</p> <ol style="list-style-type: none"> (a) LACHS; (b) native title parties; (c) knowledge holders (where known); (d) NTRBs. <p>Where one or more knowledge holders are to be notified, you will need to consider the Knowledge Holder Guidelines.</p>

Table 4—Steps for undertaking a DDA for a tier 2 activity [s. 111]



Tier 3 Activity—Steps to undertake a DDA

Under section 112 of the Act, a tier 3 activity that may harm ACH is authorised if—

- the activity is a tier 3 activity; and
- the area where the activity is carried out does not include any area that is part of a protected area; and
- a due diligence assessment is undertaken in relation to the carrying out of the activity; and
- the person carries out the activity in accordance with an approved or authorised ACH management plan.

Table 5 below and Flowchart 4 outline the DDA process for a tier 3 activity.

As referred to under section 3 **Legislative context**, steps taken under a related agreement can be used to satisfy the DDA referred to in section 102(c) or (d).

Tier 3 Activity	Steps for undertaking a DDA for a tier 3 activity	Supporting information/required Action
Step 1A	<p>Assess whether ACH is located in the Activity area of the proposed tier 3 activity [s. 102(c)]</p> <ol style="list-style-type: none"> Search the Directory. and Consider whether otherwise aware of the location of ACH in the Activity area. 	<p><i>Link to the Directory to be included</i></p> <p>If—</p> <ul style="list-style-type: none"> there is no ACH listed on the Directory or the listed ACH only partially covers the Activity area; or you are otherwise aware that there is ACH that only partially covers the Activity area; <p>proceed to Step 1B.</p> <p>If—</p> <ul style="list-style-type: none"> there is ACH listed on the Directory; or you are otherwise aware that there is ACH; <p>for the whole of the Activity area, proceed to Step 2.</p>
Step 1B	<ol style="list-style-type: none"> Review any ACH Reports relevant to the activity area³; and/or Request advice from the Department as to whether any ACH (in addition to that listed on the Directory) is located in the activity area. <p>Relevant ACH Reports can include reports that aren't on the Directory.</p> <p>ACH Reports that are consistent with the ACH Survey Report Guidelines can be relied upon for</p>	<p>If—</p> <ul style="list-style-type: none"> there is listed ACH; or you are otherwise aware that there is ACH; or ACH Reports or the Department confirm the location of ACH; <p>in the activity area, proceed to Step 2.</p> <p>If—</p> <ul style="list-style-type: none"> there is no listed ACH; and you are otherwise not aware of ACH; and ACH Reports or the Department confirm ACH is not located in the activity area; <p>then for the purposes of the DDA there is no ACH located in the activity area and no risk of harm.</p>

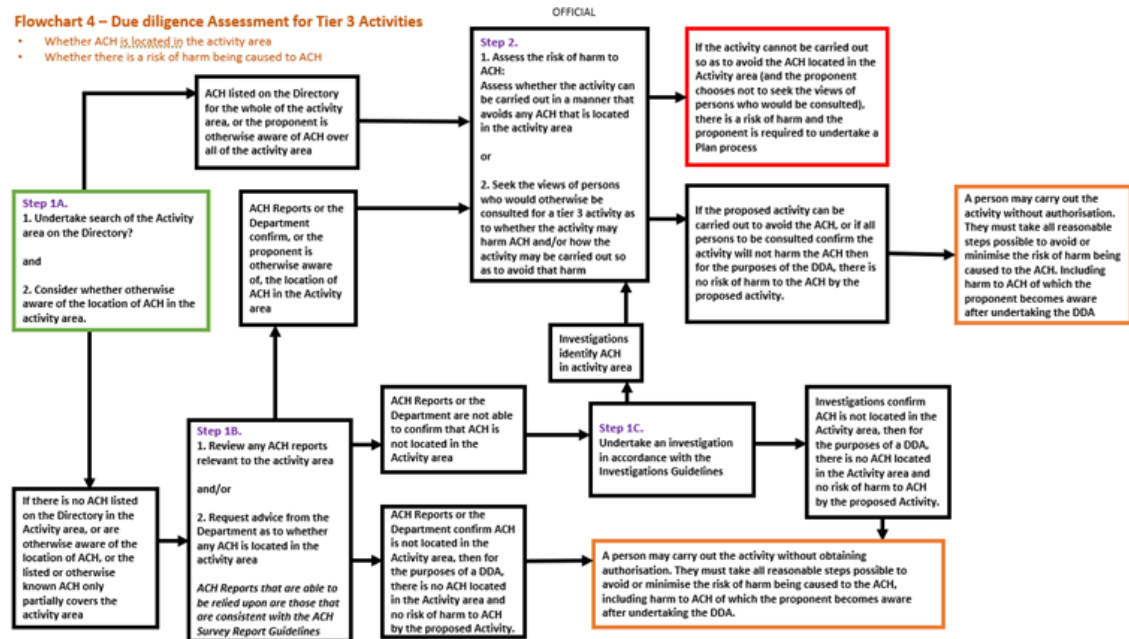
³ ACH Reports will need to cover the entire area of the Activity area for it to be confirmed there is no ACH.

	the purposes of a DDA. They will need cover the entire activity area in order to confirm that there is no ACH.	You may carry out the activity without obtaining authorisation, however, you must take all reasonable steps possible to avoid or minimise the risk of harm being caused to the ACH, including harm to ACH you become aware of after undertaking the DDA. If ACH Reports or the Department are not able to confirm that ACH is not located in the Activity area, proceed to Step 1C.
Step 1C	Undertake an ACH Investigation in accordance with the Investigation Guidelines	If an ACH Investigation identifies ACH in the area, proceed to Step 2. If an ACH Investigation confirms that ACH is not located in the Activity area, then for the purposes of a DDA, there is no ACH located in the Activity area and no risk of harm. You may carry out the activity without obtaining authorisation, however you must take all reasonable steps possible to avoid or minimise the risk of harm being caused to the ACH, including harm to ACH you become aware of after undertaking the DDA.
Step 2	Assess whether there is a risk of harm being caused to ACH by the proposed activity [s. 102(d)] 1. Assess whether the activity can be carried out in a manner that avoids the ACH that is located in the Activity area. or 2. Seek the views of persons who would be consulted for a tier 3 activity as to whether the activity may harm ACH and/or how the activity may be carried out so as to avoid that harm.	If the activity cannot be carried out so as to avoid the ACH located in the activity area (and you choose not to seek the views of persons who would be consulted) you will be required to undertake the process for a Plan. If the proposed activity can be carried out so as to avoid the ACH, or if the views of all persons to be consulted confirm the activity will not harm the ACH, then for the purposes of a DDA there is no risk of harm. You may carry out the activity without obtaining authorisation, however, you must take all reasonable steps possible to avoid or minimise the risk of harm being caused to the ACH including harm to ACH which you become aware of after undertaking the DDA.
Step 3	For a proposed tier 3 activity, the persons to be consulted activities are— (a) each LACHS (b) if there is not a LACHS— (i) each native title party for the area; and (ii) each knowledge holder for the area; (c) if there is not a LACHS or native title party or knowledge holder for the area, then, each NTRB.	The Directory contains information on— (a) LACHS; (b) native title parties; (c) knowledge holders (where known); (d) NTRBs Where a LACHS has not been appointed, the proponent will also need to have regard to the Knowledge Holder Guidelines.

Table 5—Steps for undertaking a DDA for a tier 3 activity [s. 112]

Flowchart 4 – Due diligence Assessment for Tier 3 Activities

- Whether ACH is located in the activity area
- Whether there is a risk of harm being caused to ACH



Part B Tools to assist due diligence

Searching the Directory

The Directory is a tool that assists with undertaking a DDA.

The Directory contains prescribed information about ACH that is located throughout the State. This includes information about ACH previously held on the Register of Aboriginal Sites and other information submitted under the *Aboriginal Heritage Act 1972*, as well as records of new ACH as submitted.

The Council endeavours to keep the Directory as accurate and up to date as practicable, however, the Directory *does not* contain records for all the ACH that is located within Western Australia.

Aboriginal people have lived on this land for more than 65 000 years and in doing so have developed a living culture that is bound in tradition and manifested through, among other things, familial connections, languages, stories, songs, spiritual beliefs and practices, knowledge, art, sentiment and through the skilled adaptation of resources provided by the land and water. The tangible manifestations of this living culture are widespread throughout the State, large sections of which have not yet been surveyed, or not surveyed comprehensively, by Aboriginal people. As such, there may be no record on the Directory of the ACH that exist in these areas.

The table below demonstrates how the information in the Directory assists with the DDA process and the relevant paragraph of section 102—

Information and documents on the Directory	Section 102 due diligence assessment
Protected areas boundaries	(a) whether the area, where it is intended that the proposed activity be carried out, include any area that is part of a protected area.
List of activity categories	(b) whether the proposed activity is— (i) a tier 1 activity; or (ii) a tier 2 activity; or (iii) a tier 3 activity.
Information about ACH of the State, including, where relevant— (i) a description of the characteristics of the ACH; and (ii) description of the location of the ACH; and (iii) in relation to an Aboriginal object, a description of where it is reasonably believed to have originated from; and (iv) in relation to intangible ACH—recordings (including photographs, films, audio, video, digital); (v) any other information and documents, including historical information and documents, relevant to ACH.	(c) whether ACH is located in the Activity area; [see also "Important information to consider when using the Directory" below] and (d) whether there is a risk of harm being caused to ACH by the proposed activity

Information and documents on the Directory	Section 102 due diligence assessment
LACHS	(e) in relation to a proposed activity that has been assessed as a tier 2 activity or a tier 3
Native title parties	(f) in relation to a proposed activity that has been assessed as a tier 2 activity or a tier 3 activity—identify the persons to be notified or the persons to be consulted about the proposed activity.
Knowledge holders for— (i) a particular area; (ii) particular ACH.	(g) in relation to a proposed activity that has been assessed as a tier 2 activity or a tier 3 activity—identify the persons to be notified /or the persons to be consulted about the proposed activity.

Table 6—Using the Directory for undertaking a DDA

Important information to consider when using the Directory

If a search of the Directory for a given area returns no listed ACH or does not contain any reports, it must not be presumed that ACH is not located in the area nor that a proposed activity will not result in harm to ACH.

Certain ACH listings considered as being culturally sensitive will be masked by the application of a *dithered boundary*. A dithered boundary alerts to the location of ACH by providing the general locality of the ACH rather than its specific location. The harm provisions of the Act apply only to ACH and therefore may not apply to the entirety of the area covered by the dithered boundary. The Directory clearly articulates which ACH entries contain a dithered boundary.

The Department may be contacted where there is a query as to specific locations and boundaries. Due to historical factors, it is possible that some ACH listings may not represent the precise ACH location or associated boundary. Persons accessing the Directory can contact the Department if they have any doubt as to the accuracy or completeness of information displayed on the Directory.

There will be instances where ACH that is listed on the Directory no longer exists on the ground, including because it may have been removed by a previous activity. In such circumstances, a proponent should contact the Department to check the status of that ACH.

The best way to determine whether ACH is located within a proposed Activity area is to discuss with the relevant Aboriginal people. This includes LACHS, the native title parties and knowledge holders.

Other considerations when undertaking activities that may harm ACH

To facilitate meeting the objects and principles of the Act as well as achieving positive outcomes for all parties and to assist in meeting statutory obligations, it is recommended that the following steps be undertaken—

- develop a positive and respectful relationship with the relevant Aboriginal organisation(s) (including LACHS), Aboriginal community and/or Aboriginal people;
- seek to be informed as to where ACH may be located, and its importance to Aboriginal people, in a culturally appropriate way recognising **Aboriginal people are not required to disclose culturally sensitive information**;
- ensure the Aboriginal organisation(s)/community/individuals are informed at the earliest possible stages of proposed activities and their potential impacts to ACH;
- be aware of statutory responsibilities associated with the carrying out of activities that may cause a risk of harm to ACH;
- undertake early planning and engagement in order to understand the benefits and opportunities to modify proposals to avoid or minimise harm to ACH, which may result in avoiding the need for any authorisation under the Act; and
- undertake the DDA process for tier 2 and tier 3 activities as early as possible to determine whether a Permit or Plan will be required.

Related documents

This Code relates to the following documents—

- Consultation Guidelines
- Knowledge Holder Guidelines
- State Significance Guidelines
- LACHS (Fees) Guidelines
- ACH Management Plan Form and Guiding Notes

Acronyms and definitions

ACH	Aboriginal cultural heritage
ACH Report	Report of an investigation associated with the identification of ACH that may be present in a defined area.
Act	<i>Aboriginal Cultural Heritage Act 2021</i>

activity	An activity involving no, minimal, low or moderate to high level of ground disturbance that may harm ACH
activity area	The area where it is intended that the proposed activity will be carried out
CEO	Chief Executive Officer of the Department of Planning, Lands and Heritage
Code	ACH Management Code
Council	Aboriginal Cultural Heritage Council
Directory	ACH Directory
DDA	Due diligence assessment
Department	Department of Planning, Lands and Heritage
harm	Harm to ACH includes to destroy or damage the ACH
ILUA	Means an indigenous land use agreement registered on the Register of Indigenous Land Use Agreements established and maintained under Part 8A of the <i>Native Title Act 1993</i>
interested Aboriginal party	Each of the following persons is an interested Aboriginal party for a Plan that relates to the carrying out of a proposed activity in an area— <ul style="list-style-type: none"> (a) each person designated as a local ACH service for the area or a part of the area; (b) if there is not a person designated as a local ACH service for the area or a part of the area— <ul style="list-style-type: none"> (i) each native title party for the area or the part of the area; or (ii) if there is not a native title party for the area or the part of the area—each native title representative body for the area or the part of the area.
investigations	ACH Investigations taken in accordance with the ACH Investigations Guidelines
knowledge holder	An Aboriginal person who— <ul style="list-style-type: none"> (a) in accordance with Aboriginal tradition, holds particular knowledge about ACH and areas containing ACH; and (b) has traditional rights, interests and responsibilities in respect of the ACH. (Refer to the Knowledge Holder Guidelines)
LACHS	Local Aboriginal cultural heritage service
native title party	In relation to an area, means— <ul style="list-style-type: none"> (a) a registered native title body corporate for the area; or (b) a registered native title claimant for the area; or (c) a person who was a registered native title body corporate for the area or a registered native title claimant for the area but— <ul style="list-style-type: none"> (i) under an ILUA, has surrendered their native title rights and interests in respect of the area; or (ii) whose native title rights and interests in respect of the area have been compulsorily acquired or otherwise been extinguished; or <ul style="list-style-type: none"> (d) if the area is the subject of a settlement ILUA—a regional corporation in relation to that area;
native title representative body	Means— <ul style="list-style-type: none"> (a) a body that is recognised as a representative body under the Native Title Act section 203AD; or (b) a person or body funded under the Native Title Act section 203FE to perform all, or specified, functions of a body referred to in paragraph (a).
protected area	ACH of outstanding significance to a knowledge holder (refer to the Protected Area Order Guidelines)
Permit	ACH permit—granted pursuant to Part 6 Division 5 of the Act
Plan	ACH management plan—approved or authorised under Part 6 Division 6 of the Act
proponent	A person who— <ul style="list-style-type: none"> (a) intends to carry out an activity that may harm Aboriginal cultural heritage; or carries out an activity authorised under Part 6 Division 4
proposed activity	An activity that a proponent intends to carry out
regional corporation	Has the meaning given in section 40 of the Act

registered native title body corporate/claimant	Has the meaning given in section 253 of the <i>Native Title Act 1993</i>
Regulations	<i>Aboriginal Cultural Heritage Regulations 2022</i>

Appendix 1—Activity tiers

Table of Activity Tiers

Fall-back for overlap between activities in activity categories Schedule

Most specific description of activity applies

- (1) This regulation applies if an activity (the ***overlapping activity***) is described by more than 1 activity set out in Schedule [X].
- (2) The ***most specific activity*** is—
 - (a) if 1 or more of the activities set out in Schedule [X] that describe the overlapping activity is an exempt activity—the exempt activity set out in Schedule [X] that most specifically describes the overlapping activity; or
 - (b) otherwise—the activity set out in Schedule [X] that most specifically describes the overlapping activity.
- (3) The overlapping activity is taken not to be any activity set out in Schedule [X] that is not the most specific activity.

Division 1—General activities

Subdivision 1—Exempt general activities	Subdivision 2—General tier 1 activities	Subdivision 3—General tier 2 activities	Subdivision 4—General tier 3 activities
1. The following types of development— <ol style="list-style-type: none"> (a) development set out in the <i>Planning and Development (Local Planning Schemes) Regulations 2015</i> Schedule 2 clause 61(1) the Table item 1, 2, 3, 4, 7, 8 or 13 column 1, other than in relation to a building that is Aboriginal cultural heritage about which information is contained on the ACH Directory; (b) the demolition of a multiple dwelling or grouped dwelling, other than in relation to a multiple dwelling or grouped dwelling that is Aboriginal cultural heritage about which information is contained on the ACH Directory; (c) internal building work, other than in relation to a building that is Aboriginal cultural heritage about which information is contained on the ACH Directory; (d) the erection or installation of, or alterations or additions to, any of the following on the same planning and development lot or strata or community titles lot as a multiple dwelling— <ol style="list-style-type: none"> (i) an ancillary dwelling; (ii) an outbuilding; (iii) an external fixture; (iv) a boundary wall or fence; (v) a patio; (vi) a pergola; (vii) a verandah; (viii) a deck; (ix) a garage; (x) a carport; (xi) a swimming pool; (xii) shade sails; 		38. Internal building work in relation to a building that is Aboriginal cultural heritage listed on the ACH Directory.	48. The demolition of a building that is Aboriginal cultural heritage about which information is contained on the ACH Directory.

<p>(e) the installation of a water tank that complies with the <i>Planning and Development (Local Planning Schemes) Regulations 2015</i> Schedule 2 clause 61(1) the Table item 12 column 2 conditions (b) and (c);</p> <p>(f) the erection or installation of a flagpole that complies with the <i>Planning and Development (Local Planning Schemes) Regulations 2015</i> Schedule 2 clause 61(1) the Table item 14, column 2 conditions (a) to (d);</p> <p>(g) development carried out on a subdivided parcel of land if—</p> <ul style="list-style-type: none"> (i) a residential building is located on the land, or will be constructed on the land; and (ii) the subdivision was the subject of an approved or authorised ACH management plan; and (iii) the development is consistent with that subdivision. <p><i>Note for this item—</i> See regulation 36(1) and paragraph (b) of the definition of exempt activity in section 100 of the Act.</p>			
<p>2. Construction, renovation or demolition of a residential building on a strata or community titles lot that is less than 1 100 m².</p>		<p>29. Construction or renovation of—</p> <ul style="list-style-type: none"> (a) a residential building on a planning and development lot, or strata or community titles lot in a strata or community titles scheme, that is 1 100 m² or larger; or (b) a building ancillary to such a building on— <ul style="list-style-type: none"> (i) the planning and development lot; or (ii) the strata or community titles lot or common property in the strata or community titles scheme. 	
<p>3. Installing or maintaining reticulated electricity, gas, water, sewerage, drainage or telecommunications services if the works are located between—</p>	<p>22. Erecting or installing a fence in a way that does not involve clearing.</p>	<p>30. Installing or maintaining reticulated electricity, gas, water, sewerage, drainage or</p>	

<p>(a) the boundary of a planning and development lot, a strata or community titles lot in a strata or community titles scheme, or common property in the strata or community titles scheme if—</p> <p>(i) a residential building is located on the lot, or will be constructed on the lot; and</p> <p>(ii) the lot is less than 1 100 m²;</p> <p>and</p> <p>(b) 1 of the following—</p> <p>(i) the residential building;</p> <p>(ii) a building ancillary to the residential building;</p> <p>(iii) where the residential building or an ancillary building will be constructed.</p>		<p>telecommunications services if the works are located between—</p> <p>(a) the boundary of a planning and development lot, a strata or community titles lot in a strata or community titles scheme, or common property in the strata or community titles scheme if—</p> <p>(i) a residential building is located on the lot, or will be constructed on the lot; and</p> <p>(ii) the lot is 1 100 m² or larger;</p> <p>and</p> <p>(b) 1 of the following—</p> <p>(i) the residential building;</p> <p>(ii) a building ancillary to the residential building;</p> <p>(iii) where the residential building or an ancillary building will be constructed.</p>	
<p>4. Installing a driveway or crossover on a planning and development lot, a strata or community titles lot in a strata or community titles scheme, or common property in the strata or community titles scheme if—</p> <p>(a) a residential building is located on the lot, or will be constructed on the lot; and</p> <p>(b) the lot is less than 1 100 m².</p>		<p>31. Installing a driveway or crossover on a planning and development lot, a strata or community titles lot in a strata or community titles scheme, or common property in the scheme, other than as described in item 4.</p>	
<p>5. <i>Subdivision of land that results in the creation of no more than 5 planning and development lots or</i></p>			<p>44. Subdivision of land.</p>

strata or community titles lots, each of which is less than 1 100 m ² .			
6. Maintaining existing infrastructure in a way that does not involve disturbance to ground beyond that which was disturbed during the construction of, or earlier works in relation to, the infrastructure.	120. Maintaining existing infrastructure in a way that does not, over the course of 1 calendar year, involve any of the following— (a) removing more than 4 kg of material; (b) disturbing more than 10 m ² of ground in total; (c) disturbing more than 1 m ² of contiguous ground; (d) excavating to a depth of more than 0.5 m.	33. Maintaining existing infrastructure, other than as described in item 20, in a way that does not involve any of the following— (a) removing more than 20 kg of material; (b) disturbing more than 200 m ² of ground in total; (c) disturbing more than 10 m ² of contiguous ground; (d) excavating to a depth of more than 1 m.	45. Maintaining existing infrastructure, other than as described in item 20 or 33.
7. The demolition of a structure, other than a building, in a way that does not involve disturbance to ground beyond that which was disturbed during the construction of, or earlier works in relation to, the structure.	21. The demolition of a structure, other than a building, in a way that does not, over the course of 1 calendar year, involve any of the following— (a) removing more than 4 kg of material; (b) disturbing more than 10 m ² of ground in total; (c) disturbing more than 1 m ² of contiguous ground; (d) excavating to a depth of more than 0.5 m.	34. The demolition of a structure, other than a building and other than as described in item 21, in a way that does not involve any of the following— (a) removing more than 20 kg of material; (b) disturbing more than 200 m ² of ground in total; (c) disturbing more than 10 m ² of contiguous ground; (d) excavating to a depth of more than 1 m.	46. The demolition of a structure, other than a building and other than as described in item 21 or 34.

8. Undertaking an activity in an area that results in land use or development that— (a) is no greater in surface area or height than existing land use or development in the area; and (b) is either— (i) no greater in depth than existing land use or development in the area; or (ii) only greater in depth than existing land use or development in the area in a part of the area in which the depth of the existing land use or development extends 10 m or lower below natural ground level.			
9. Temporarily placing equipment on an existing area of ground disturbance.	18. Temporarily placing a structure on an existing area of ground disturbance.	32. Erecting or installing a structure on undisturbed ground in a way that does not involve building foundations for the structure.	
		35. Undertaking an activity in an area that results in land use or development that is no greater in surface area than existing land use or development in the area.	
10. Visually inspecting an area as part of undertaking a due diligence assessment.			
11. Lifestyle and general maintenance activities associated with a residential building, including gardening, repairs and carrying out minor development (for example installing a chicken coop or play equipment).	19. Removing plant and equipment.		
12. Driving a vehicle on an existing area of ground disturbance.	23. Driving a vehicle in a way that does not result in a new track being formed.	36. An activity that will, through repetition by the proponent, result in a new track being formed.	
13. Setting up and using a temporary camp— (a) in a way that does not involve clearing the camp site; and (b) that involves only 1 or more of the following forms of accommodation— (i) swags; (ii) tents; (iii) camper trailers; (iv) caravans.			
14. Aerial transportation that does not involve clearing at the landing site.		39. Burning, other than as part of another activity described in Divisions 1 to 8.	

15. A burial authorised under the <i>Cemeteries Act 1986</i> section 12 of an Aboriginal person.		40. A burial authorised under the <i>Cemeteries Act 1986</i> section 12 of a non-Aboriginal person.	
16. A burial under the <i>Cemeteries Act 1986</i> section 11, other than a burial authorised under section 12 of that Act.			
17. Caring for, controlling or managing a cemetery declared under the <i>Cemeteries Act 1986</i> section 4(1).			51. Establishing or expanding a cemetery declared under the <i>Cemeteries Act 1986</i> section 4(1).
	24. Clearing for tracks in a way that does not, over the course of 1 calendar year, involve any of the following— (a) removing more than 4 kg of material; (b) disturbing more than 10 m ² of ground in total; (c) disturbing more than 1 m ² of contiguous ground; (d) excavating to a depth of more than 0.5 m.	37. Clearing for tracks, other than as described in item 24, in a way that does not involve any of the following— (a) removing more than 20 kg of material; (b) disturbing more than 200 m ² of ground in total; (c) disturbing more than 10 m ² of contiguous ground; (d) excavating to a depth of more than 1 m.	47. Clearing for tracks, other than as described in item 24 or 37.
	25. Drilling, carried out as part of bore construction, in a way that does not involve any of the following— (a) disturbing more than 10 m ² of ground in total (b) disturbing more than 1 m ²	42. Drilling, carried out as part of bore construction, other than as described in item 25, in a way that does not involve any of the following— (a) disturbing more than 200 m ² of ground in total. (b) disturbing more than 10 m ² of contiguous ground.	50. Drilling, other than as part of another activity described by another item in Divisions 1 to 8. <i>Examples for this item—</i> 1. Rotary mud drilling. 2. Diamond drilling. 3. Percussion drilling. 4. Drilling carried out as part of bore

	of contiguous ground.		<i>construction that involves disturbing more than 200 m² of ground in total or more than 10 m² of contiguous ground.</i>
		41. Air core drilling.	49. Blasting.
	26. Stockpiling on an established stockpile.	43. Establishing a stockpile with a surface area of 200 m ² or less.	52. Establishing a stockpile, other than as described in item 43.
	27. Stockpile sampling.		
	28. Removing a stockpile.		

Division 2—Emergency activities

Subdivision 1—Exempt emergency activities	Subdivision 2—Tier 1 emergency activities		
53. An emergency management activity intended to prevent imminent loss of life, prejudice to the safety, or harm to the health, of people or animals.	55. Fire hazard reduction.		
54. An activity undertaken in an emergency situation for the purpose of preventing or minimising irreversible damage to a significant part of the environment.	56. Inspecting, protecting, providing or restoring essential services.		
	57. Complying with a notice given under the <i>Bush Fires Act 1954</i> section 33(1) or a direction given under section 33(4)(a) of that Act.		

Division 3—Aboriginal cultural heritage investigation activities

Subdivision 1—Exempt Aboriginal cultural heritage investigation activities		Subdivision 2—Tier 2 Aboriginal cultural heritage investigation activities	Subdivision 3—Tier 3 Aboriginal cultural heritage investigation activities
58. Investigation of Aboriginal cultural heritage, carried out on foot, that does not involve excavation or removal of Aboriginal cultural heritage. <i>Examples for this item—</i> <ol style="list-style-type: none"> 1. Site recording and assessment. 2. Monitoring and auditing. 3. Digital capture of Aboriginal cultural heritage. 4. Non-digital photography. 5. Probing. 		61. Investigation of Aboriginal cultural heritage that does not involve any of the following— <ol style="list-style-type: none"> (a) the use of non-handheld equipment; (b) test pitting, excavation or other ground disturbance over a surface area that is 	62. Investigation of Aboriginal cultural heritage other than as part of another activity described in this Division.

		<p>greater than 1 m²;</p> <p>(c) removing any more Aboriginal cultural heritage than necessary for investigation purposes;</p> <p>(d) rock chipping or making moulds of petroglyphs or rock art.</p> <p><i>Examples for this item—</i></p> <ol style="list-style-type: none"> <i>Radiocarbon dating.</i> <i>Luminescence dating.</i> <i>Dosimetry.</i> <i>Extraction of scarred element parts from scarred trees.</i> <i>Mechanical sieving.</i> 	
59. Removal or relocation of an Aboriginal object located in an area by, or with the written approval of, a local ACH service for the area.			
60. Investigation of Aboriginal cultural heritage located in an area by, or with the written approval of—			
<p>(a) a local ACH service for the area; or</p> <p>(b) if there is not a local ACH service for the area—</p> <ol style="list-style-type: none"> a native title party for the area; or if there is not a native title party for the area— a native title representative body for the area. 			
Division 4—Activities impacting waterways or coastal waters			
Subdivision 1—Exempt activities involving waterways or coastal waters	Subdivision 2—Tier 1 activities impacting waterways or coastal waters	Subdivision 3—Tier 2 activities impacting waterways or coastal waters	Subdivision 4—Tier 3 activities impacting waterways or coastal waters
63. Anchoring a boat in a waterway or coastal waters.		77. Installing a mooring into, or anchoring a mooring to, the bed or banks of a waterway or coastal waters.	
64. Maintenance of a waterway or coastal waters, including the bed or banks of a waterway or coastal waters, to rectify accretion and erosion of natural material.			81. Capital dredging.
	65. Taking water from a waterway or coastal waters		80. Reclaiming land from a waterway or coastal waters

	without causing ground disturbance.		or reshaping a beach.
	66. Discharging water into a waterway or coastal waters in a way that does not involve disturbance to the bed or banks of the waterway or coastal waters.	72. Discharging water into a waterway or coastal waters, other than as described in item 66.	
	67. Monitoring and sampling in relation to a waterway or coastal waters in a way that does not, over the course of 1 calendar year, involve any of the following— (a) removing more than 4 kg of material; (b) disturbing more than 10 m ² of the bed or banks of the waterways or coastal waters in total; (c) disturbing more than 1 m ² of contiguous bed or banks of the waterways or coastal waters; (d) excavating the bed or banks of the waterway or coastal waters to a depth of more than 0.5 m.	73. Monitoring and sampling in relation to a waterway or coastal waters, other than as described in item 67.	
	68. Removing litter from a waterway or coastal waters in a way that does not involve disturbance to the bed or banks of the waterway or coastal waters beyond that		

	which was caused by leaving the litter.		
	<p>69. Removing flora from a waterway or coastal waters in a way that does not, over the course of 1 calendar year, involve any of the following—</p> <p>(a) removing more than 4 kg of material (not counting the flora);</p> <p>(b) disturbing more than 10 m² of the bed or banks of the waterway or coastal waters in total;</p> <p>(c) disturbing more than 1 m² of contiguous bed or banks of the waterway or coastal waters;</p> <p>(d) excavating the bed or banks of the waterway or coastal waters to a depth of more than 0.5 m.</p>	<p>75. Removing flora from a waterway or coastal waters, other than as described in item 69, in a way that does not involve any of the following—</p> <p>(a) removing more than 20 kg of material (not counting the flora);</p> <p>(b) disturbing more than 200 m² of the bed or banks of the waterway or coastal waters in total;</p> <p>(c) disturbing more than 10 m² of contiguous bed or banks of the waterway or coastal waters;</p> <p>(d) excavating the bed or banks of the waterway or coastal waters to a depth of more than 1 m.</p>	<p>82. Removing flora from a waterway or coastal waters, other than as described in item 69 or 75.</p>
	<p>70. Placing pipe or cable on the bed or banks of a waterway or coastal waters without anchoring the pipe or cable to the bed or banks.</p>		<p>83. Establishing new, or expanding existing, trench irrigation.</p>
	<p>71. Installing a structure into, or anchoring a structure to, the bed or banks of a</p>	<p>78. Installing a structure into, or anchoring a structure to, the bed or banks of a waterway or</p>	<p>86. Installing a structure into, or anchoring a structure to, the bed or banks of a</p>

	<p>waterway or coastal waters in a way that does not, over the course of 1 calendar year, involve any of the following—</p> <p>(a) removing more than 4 kg of material;</p> <p>(b) disturbing more than 10 m² of the bed or banks in total;</p> <p>(c) disturbing more than 1 m² of contiguous bed or banks;</p> <p>(d) excavating the bed or banks to a depth of more than 0.5 m.</p>	<p>coastal waters, other than as described in item 71, in a way that does not involve any of the following—</p> <p>(a) removing more than 20 kg of material;</p> <p>(b) disturbing more than 200 m² of the bed or banks in total;</p> <p>(c) disturbing more than 10 m² of contiguous bed or banks;</p> <p>(d) excavating the bed or banks to a depth of more than 1 m.</p>	<p>waterway or coastal waters, other than as described in item 71 or 78</p>
		<p>74. Stabilising the bed or banks of a waterway or coastal waters using handheld equipment only, including—</p> <p>(a) matting installation; or</p> <p>(b) brushing; or</p> <p>(c) surface preparation for application of materials.</p>	<p>79. Stabilising the bed or banks of a waterway or coastal waters using non-handheld equipment.</p>
		<p>76. Installing a structure to enable the movement of fauna within a waterway or coastal waters.</p>	<p>84. Establishing an aquaculture or mariculture pen and supporting infrastructure.</p>
			<p>85. Erecting or installing a dam, weir or waterway diversion.</p>
			<p>87. Erecting, installing or expanding a structure in a waterway or coastal waters, other than as</p>

			part of another activity described in this Division.
Division 5—Agriculture and natural resource management activities			
	Subdivision 1— Tier 1 agriculture and natural resource management activities	Subdivision 2— Tier 2 agriculture and natural resource management activities	Subdivision 3— Tier 3 agriculture and natural resource management activities
	88. Controlling feral or pest fauna without digging or excavating.	90. Controlling feral or pest fauna, other than as described in item 88.	
	89. Managing weeds or flora in a way that does not, over the course of 1 calendar year, involve any of the following— (a) removing more than 4 kg of material (not counting the weeds or flora); (b) disturbing more than 10 m ² of ground in total; (c) disturbing more than 1 m ² of contiguous ground; (d) excavating to a depth of more than 0.5 m.	91. Managing weeds or flora, other than as described in item 89, in a way that does not involve any of the following— (a) removing more than 20 kg of material (not counting the weeds or flora); (b) disturbing more than 200 m ² of ground in total; (c) disturbing more than 10 m ² of contiguous ground; (d) excavating to a depth of more than 1 m.	93. Managing weeds or flora, other than as described in item 89 or 91.
		92. Erecting or installing new agricultural infrastructure on existing agricultural land. Examples for this item— 1. Erecting or installing a stock watering point. 2. Erecting or installing a new yard.	94. Conducting agricultural activities in an area not previously subject to agricultural activities.
			95. Establishing a new farm or

			pastoral station.
			96. Establishing a new tree plantation.
			97. Harvesting trees in an area not previously subject to tree harvesting.

Division 6—Field investigation activities

	Subdivision 1— Tier 1 field investigation activities	Subdivision 2— Tier 2 field investigation activities	Subdivision 3— Tier 3 field investigation activities
	98. An aerial survey.		
	99. A field investigation (including exploration) that does not, over the course of 1 calendar year, involve any of the following— (a) removing more than 4 kg of material; (b) disturbing more than 10 m ² of ground in total; (c) disturbing more than 1 m ² of contiguous ground; (d) excavating to a depth of more than 0.5 m.	100. A field investigation (including exploration), other than as described in item 99, that does not involve any of the following— (a) removing more than 20 kg of material; (b) disturbing more than 200 m ² of ground in total; (c) disturbing more than 10 m ² of contiguous ground; (d) excavating to a depth of more than 1m.	102. A field investigation (including exploration), other than as described in item 99 or 100.
		101. A seismic survey that does not involve using a seismic vibrator truck.	103. A seismic survey, other than as described in item 101.
			104. Costeaning.

Division 7—Mining activities

	Subdivision 1— Tier 1 mining activities	Subdivision 2— Tier 2 mining activities	Subdivision 3— Tier 3 mining activities
	105. Marking out under the <i>Mining Act 1978</i> .		

	106. Metal detecting.	109. Bulk leach extractable gold (BLEG).	
	107. Scrape and detect activities using handheld equipment only.		111. Scrape and detect activities using non-handheld equipment.
	108. Extracting basic raw materials— (a) from within existing pits; and (b) in a way that does not involve an increase to the area of ground disturbance.	110. Reopening underground mine workings.	112. Activities involved with establishing a new, or expanding an existing, mine or mine site.

Division 8—Rehabilitation and remediation activities

Subdivision 1—Exempt rehabilitation and remediation activities	Subdivision 2—Tier 1 rehabilitation and remediation activities	Subdivision 3—Tier 2 rehabilitation and remediation activities	Subdivision 4—Tier 3 rehabilitation and remediation activities
	<p>114. Preliminary contaminated site investigation.</p> <p>Examples for this item—</p> <ol style="list-style-type: none"> Identifying potential sources of contamination, contaminants of concern, receptors that may be exposed to contamination and exposure pathways. Carrying out a site inspection. 	<p>118. Detailed contaminated site investigation.</p> <p>Examples for this item—</p> <ol style="list-style-type: none"> Collecting and evaluating site-specific data. Carrying out a detailed site investigation to establish ground conditions. Collecting soil and groundwater samples. 	
<p>113. Removing surface waste, litter or contaminated or waste material from—</p> <ol style="list-style-type: none"> a planning and development lot on which a residential building is located, or will be constructed; or a strata or community titles lot on which a residential building is located, or will be constructed, or common property in the relevant strata or community titles scheme. 	<p>115. Removing surface waste, litter or contaminated or waste material in a way that does not, over the course of 1 calendar year, involve any of the following—</p> <ol style="list-style-type: none"> removing more than 4 kg of material (not counting the surface waste, litter or contaminated 	<p>119. Removing surface waste, litter or contaminated or waste material, other than as described in item 115, in a way that does not involve any of the following—</p> <ol style="list-style-type: none"> removing more than 20 kg of material (not counting the surface waste, litter or contaminated or waste material); 	<p>123. Removing surface waste, litter or contaminated or waste material, other than as part of an activity described by another item in this Division.</p>

	or waste material); (b) disturbing more than 10 m ² of ground in total; (c) disturbing more than 1 m ² of contiguous ground; (d) excavating to a depth of more than 0.5 m.	(b) disturbing more than 200 m ² of ground in total; (c) disturbing more than 10 m ² of contiguous ground; (d) excavating to a depth of more than 1m.	
	116. Revegetation using handheld equipment only.	120. Revegetation using non-handheld equipment.	124. Landform re-contouring or reshaping.
		121. A remediation activity not otherwise described in this Subdivision or Subdivision 2, that does not involve any of the following— (a) removing more than 20 kg of material; (b) disturbing more than 200 m ² of ground in total; (c) disturbing more than 10 m ² of contiguous ground; (d) excavating to a depth of more than 1 m.	125. A remediation activity not described by another item in this Division.
	117. Rehabilitation of drill holes including casing removal, sealing and capping.	122. A rehabilitation activity not otherwise described in this Subdivision or Subdivision 2 that is carried out in an area that has been subject to ground disturbance.	126. A rehabilitation activity not described by another item in this Division.
Division 9—Other activities			
	Subdivision 1— Other tier 1 activities	Subdivision 2— Other tier 2 activities	Subdivision 3— Other tier 3 activities
	127. An activity that— (a) is not described by an item in any other Division of this	128. An activity that— (a) is not described by an item in any other Division of this Schedule; and	129. An activity that— (a) is not described by another item in this Schedule; and;

	Schedule; and (b) is not an exempt activity; and (c) does not, over the course of 1 calendar year, involve any of the following— — (i) removing more than 4 kg of material; (ii) disturbing more than 10 m ² of ground in total; (iii) disturbing more than 1 m ² of contiguous ground; (iv) excavating to a depth of more than 0.5 m.	(b) is not an exempt activity or tier 1 activity; and (c) does not involve any of the following— (i) removing more than 20 kg of material; (ii) disturbing more than 200 m ² of ground in total; (iii) disturbing more than 10 m ² of contiguous ground; (iv) excavating to a depth of more than 1 m.	(b) is not an exempt activity.
--	---	--	--------------------------------

Definitions for activity categories

ancillary dwelling has the meaning given in the *Planning and Development (Local Planning Schemes) Regulations 2015* Schedule 2 clause 1;

application area has the meaning given in section 69 of the Act;

boat means a vessel, craft or floating platform of any description that is capable of use in or on water, whether floating or submersible;

coastal waters means the coastal waters of the State as defined in the *Off-shore (Application of Laws) Act 1982* section 2;

common property means—

- (a) in relation to a strata titles scheme as defined in the *Strata Titles Act 1985* section 3(1)—common property as defined in that section; or
- (b) in relation to a tier 1 scheme, tier 2 scheme or tier 3 scheme as defined in the *Community Titles Act 2018* section 3(1)—common property as defined in that section;

emergency management has the meaning given in the *Emergency Management Act 2005* section 3;

grouped dwelling has the meaning given in the *Planning and Development (Local Planning Schemes) Regulations 2015* Schedule 2 clause 1; in

litter has the meaning given in the *Litter Act 1979* section 5(1);

multiple dwelling has the meaning given in the *Planning and Development (Local Planning Schemes) Regulations 2015* Schedule 2 clause 1;

planning and development lot means a lot as defined in the *Planning and Development Act 2005* section 4(1);

residential building means a building occupied, or intended for occupation, as a place of residence;

strata or community titles lot means—

- (a) a lot in a strata scheme or lot in a survey-strata scheme as defined in the *Strata Titles Act 1985* section 3(1); or
- (b) a lot as defined in the *Community Titles Act 2018* section 3(1);

strata or community titles scheme means—

- (a) a strata titles scheme as defined in the in the *Strata Titles Act 1985* section 3(1); or
- (b) a tier 1 scheme, tier 2 scheme or tier 3 scheme as defined in the *Community Titles Act 2018* section 3(1);

tracks includes walking tracks, horse tracks and access tracks;

waterway includes the following—

- (a) a river, creek, brook or other naturally flowing stream of water, whether or not it flows permanently;

- (b) a lake, salt lake, claypan, lagoon, marsh or swamp;
- (c) a floodplain, estuary or inlet;
- (d) an artificial waterway as defined in the *Planning and Development Act 2005* section 4(1).

Appendix 2—Engagement with Aboriginal people subsequent to the DDA process

Notification to Aboriginal parties

A proponent intending to carry out a **tier 2 activity** that may harm ACH must give written notice to the persons to be notified [s. 113] providing details of—

- (i) the proposed activity; and
- (ii) the area where the proponent intends to carry out the activity;

and including an opportunity to submit a statement about the person's views about the risk of harm being caused to ACH located in the area.

In considering submissions, the proponent should take all reasonable steps possible to avoid or minimise risk of harm to ACH by the activity/located in the area.

In deciding whether to grant a Permit, the Council needs to be satisfied that the applicant will take all reasonable steps possible to avoid or minimise the risk of harm being caused to ACH by the activity.

Consultation with Aboriginal parties

A proponent intending to carry out a tier 2 or tier 3 activity that is the subject of a Plan must consult with the persons to be consulted [s. 139]. Consultation must be carried out in a reasonable time and in accordance with the Consultation Guidelines.

Persons to be notified or consulted [s. 107]

The persons to be notified or consulted about an activity that is proposed to be carried out are—

- (a) each person designated as a local ACH service for the area or a part of the area;
- (b) if there is not a person designated as a local ACH service for the area or a part of the area
 - (i) each native title party for the area or the part of the area; or
 - (ii) each knowledge for the area or part of the area;
 - (iii) if there is not a LACHS, native title party or knowledge holder for the area or the part of the area—each NTRB for the area or the part of the area.

CONSULTATION GUIDELINES

Commencement

The Consultation guidelines come into effect on 1 July 2023.

Purpose

The *Aboriginal Cultural Heritage Act 2021* (Act) provides a modern framework for the recognition, protection, conservation and preservation of Aboriginal cultural heritage (ACH), while also recognising its fundamental importance to Aboriginal people. Consultation with Aboriginal people, as well as being a requirement under the Act, is also widely recognised as a critical component of better protecting ACH. It puts Aboriginal people at the heart of decision-making for the protection and management of their heritage.

Principles of informed consent are enshrined in the Act in relation to the process of agreement making. These guidelines set out how consultation is to be undertaken to satisfy the obligation under section 139 of the Act to consult on an ACH management plan (Plan). Section 134 sets out when a Plan is required.

Overview

Principles and benefits of successful consultation

Whilst these guidelines are specific to the legislative requirements for preparing a Plan, successful consultation is the foundation of positive relationships with Aboriginal people and ultimately the protection and management of ACH. Successful consultation rests on two principles—

1. All parties have rights and responsibilities.
2. Early engagement results in better outcomes.

Early and ongoing engagement in a culturally appropriate and respectful manner contributes to the development of trust and relationships, resulting in outcomes that respond to the needs of all parties. Ongoing communication with Aboriginal communities is essential to building this trust and relationships, to strengthening understanding of proposed activities and to give confidence to Aboriginal people that their views are valued and will be considered and respected.

Once consultation has been undertaken, and if the proponent is required to develop a Plan, the proponent will subsequently be required to negotiate the Plan with the interested Aboriginal parties as set out in section 135 of the Act.

Section 141 states that a proponent who intends to carry out an activity under a Plan must take reasonable steps to identify, and obtain an understanding of the characteristics of, the ACH located in the area to which the plan is to relate. Consultation undertaken in accordance with these guidelines will assist in that identification and obtaining that understanding.

Related agreements may be used to satisfy consultation requirements

Under section 140 of the Act, a related agreement may be used to satisfy the consultation requirements set out in section 139 to the extent that the consultation complies with those requirements.

A related agreement is an agreement that contains provisions about—

- (i) the management of ACH in an area;
- (ii) the carrying out of an activity to which authorisation under Part 6 is required; and

and is between a proponent for the activity being, or a proposed activity intended to be, carried out in the area and—

- (i) a person who is an Aboriginal party to an approved or authorised Plan;
- (ii) a person who would be an interested Aboriginal party for the Plan; or
- (iii) otherwise, one or more of the persons to be notified or the persons to be consulted about proposed activities.

Legislative context

Consultation on a Plan must be carried out within a reasonable time and in accordance with these Guidelines [s. 139].

An approved or authorised Plan is required for any tier 3 activity that may harm ACH. A Plan can also be prepared for a tier 2 activity that may harm ACH.

Scope

Section 101 states that consultation that occurs in relation to the proposed activity will depend on the circumstances of the activity but should include the following—

- (a) the proponent making a genuine attempt to contact and consult, in a timely manner, each person to be consulted;
- (b) the proponent providing sufficient information about the proposed activity to each person to be consulted to enable them to understand the proponent's reasoning and intention;
- (c) each person to be consulted having an opportunity to clearly state their position on the proposed activity and explain that position;
- (d) the proponent and each person to be consulted disclosing relevant and necessary information about their position as reasonably requested;

- (e) the proponent taking reasonable steps to follow up with a person to be consulted if there is no response to the initial contact or a reasonable request for further information.

Other instances where engagement with Aboriginal people may be required by the Act, such as notification in relation to the grant of an ACH permit, are not covered by these guidelines.

Consultation requirements

Who should be consulted?

The persons to be consulted about an activity that a proponent is carrying out, or a proposed activity that the proponent intends to carry out, in an area are those persons referred to in [s. 107] comprising—

- (a) each LACHS for the area or a part of the area;
- (b) if there is no LACHS for the area or a part of the area—each native title party and each knowledge holder for the area or the part of the area;
- (c) if there is not a LACHS, native title party or knowledge holder—each native title representative body (NTRB) for the area or the part of the area.

Initial contact

The proponent must make a genuine attempt to contact and consult, in a timely manner, each person to be consulted [s. 101(a)].

Attempts at initial contact must be by email, letter, telephone, text or similar direct message, social media, fax or in person.

When making initial or follow up contact, the proponent must provide the name and position of the person making contact, the name of the organisation, details of the project, contact details for the relevant person in the organisation and an invitation to participate in the consultation.

A proponent may request the assistance of the Department to identify the persons to be consulted [s. 108].

Where the person to be consulted has indicated a preferred method or methods of contact of which the proponent is aware, the proponent must use the preferred method or methods where practicable.

Follow up contact

The proponent must take reasonable steps to follow up with persons to be consulted if there is no response to the initial contact [s. 101(e)].

Attempts to follow up with persons to be consulted must include, where practicable, more than one of the methods referred to above. Where the proponent has a mailing address, a follow up method (where not previously used) must include sending a letter outlining the details required for initial contact to that mailing address in accordance with section 283(1)(c) of the Act.

Follow up contact where a LACHS has been designated

Where there is no response to the initial contact, further attempts at **initial contact** must be undertaken once per week for a **minimum** period of a further three weeks.

Follow up contact where a LACHS has not been designated

Where there is no response to the initial contact, further attempts at initial contact must be undertaken across a **minimum** period of a further 10 weeks as follows—

- once a fortnight for the first the first eight weeks; then
- once per week for the remaining two weeks.

This period is inclusive of allowances for cultural conventions and commitments.

Contacting knowledge holders

The Knowledge Holder Guidelines set out the steps to be taken to identify persons who are knowledge holders for ACH or an area containing ACH. This includes contacting a registered native title body corporate (RNTBC), NTRB and the Department.

Where a proponent is aware of, but does not have contact details for, a knowledge holder for whom a RNTBC, NTRB or the Department has contact details that they are unable to provide, the proponent must as soon as is practicable request that the RNTBC, NTRB or Department provide the proponent's contact details to the knowledge holder and ask the knowledge holder to contact the proponent. RNTBCs and NTRB are encouraged to provide the proponent's contact details to the knowledge holder.

The Department will take all reasonable steps to provide the proponent's contact details to the knowledge holder and request the knowledge holder to contact the proponent.

The knowledge holders that a proponent is required to contact directly are those knowledge holders for whom it has contact details at the end of the follow up contact period referred to above.

Where there is **one or more knowledge holder** (not otherwise represented by the native title party) for whom the proponent does not have contact details, then a proponent must give public notice to be published on a website maintained by, or on behalf of, the Council. The Department will need to be contacted to arrange the public notice¹.

¹ Subject to the provisions relating to five and 20 knowledge holders, the proponent will still be required to contact directly those knowledge holders for whom it has contact details.

Where there are more than **five knowledge holders** (not otherwise represented by the native title party) for which the proponent has email, mobile telephone or social media details, the proponent can use any of these methods for the purposes of undertaking consultation irrespective of any preferred method of contact identified by the knowledge holder.

Where there are more than **20 knowledge holders** (not otherwise represented by the native title party) for whom the proponent has contact details, the proponent can give public notice to be published on a website maintained by, or on behalf of, the Council. The Department will need to be contacted to arrange for the public notice.

The public notice must include an invitation to the first consultation meeting, as detailed in section 5.6.1 below.

Other matters

1. If, throughout the process of attempting initial contact or follow up contact, a proponent does not receive a response, the proponent must take reasonable steps to identify and use alternative methods of contact. This may include contacting the RNTBC, NTRB or the Department for assistance.
2. Records must be kept of all attempts to make contact and actual contact made.
The records must include the date, time and form of attempted and actual contact, including details of any information provided and responses received
3. Letters, emails and faxes are required to be sent as set out in s 283 of the Act.
4. Once contact has been established, a proponent must provide the opportunity for the persons to be consulted to advise of any constraints the person to be consulted may have and to respond to such constraints, particularly in relation to the timing and location of the consultation. These constraints may include—
 - periods for cultural obligations (these range between October to March depending on various factors and vary throughout the State) and sorry business; and
 - cultural and social protocols, such as gender and kinship.
5. A LACHS must publicise details of any unavailability due to cultural commitments on its website and on a website maintained by, or on behalf, of the ACH Council. A LACHS is not required to do so where not culturally appropriate.

Where initial and follow up contact with the persons to be consulted is unsuccessful

Where a proponent has—

- (a) been unable to make contact with persons to be consulted after following the steps above; and
- (b) provided the information required to be sent for initial contact and an opportunity to respond within a reasonable time, being no less than 21 days after the date that the last follow up contact was sent, including an option to meet in person—

then, if after at least 21 days, there is still no response from the persons to be consulted, the proponent has complied with the obligation to make a genuine attempt to consult within a reasonable time.

Consultation meetings

Where contact has been made with the persons to be consulted, a proponent who intends to carry out an activity under a Plan must consult with those persons about the proposed activity.

If a reasonable request for information is made at any time throughout the consultation, unless otherwise agreed, the parties are required to use their best endeavours to provide a substantive response within a maximum of four weeks.

The proponent must attempt to hold a minimum of three meetings with the persons to be consulted. The second and third meetings must, where practicable, be held at least two weeks after the previous meeting or unless otherwise agreed by all those to be consulted.

The purpose of the three meetings is—

1. the proponent must provide sufficient information about the proposed activity to the persons to be consulted to enable them to understand the proponent's reasoning and intention [s. 101(b)].
2. the persons to be consulted must be provided with an opportunity to clearly state their position on the proposed activity and to explain that position [s. 101(c)].
3. the proponent and the persons to be consulted must disclose relevant and necessary information about their position as reasonably requested [s. 101(d)].

Where none of the persons to be consulted attend the first or second meeting, or the parties agree that a second or third meeting is not required, the proponent is not required to hold any further meetings.

It is the proponent's responsibility to provide a meeting venue including reasonable weather protection. Other than participation by a LACHS (see LACHS fees guidelines), a proponent is not required to pay a fee to, or cover the costs of, a person being consulted unless there is prior written agreement between the parties.

First meeting

The first meeting is for the proponent to provide background, objectives and proposed outcomes of the project and an invitation to the second and third meetings.

The proponent is to invite the persons to be consulted to participate in the first meeting. The invitation to the first meeting must include—

- (i) the name of the person and contact detail of the person who is making the invitation;
- (ii) the proponent;
- (iii) a summary of the project;
- (iv) two alternative meeting dates and venue(s) for the first meeting; and
- (v) if required, request contact details of the persons to be consulted.

The first of the two meeting dates is to be organised at least two weeks from the date of the invitation/public notice. The second meeting date is to be held at least one week later.

At least one of these two meetings must, where practicable, be held in the area of the proposed activity, unless otherwise agreed by all those to be consulted that this is not required.

Second meeting

The second meeting is for the persons to be consulted to be able to state and explain their position on the proposed activity, including the identity and characteristics of the ACH located in the area of the activity and how impacts can be avoided or minimised.

Aboriginal people are not required to disclose culturally sensitive information.

Third meeting

The third meeting is for the proponent to discuss how the views provided in the second meeting have been addressed as part of the preferred method for carrying out the activity.

Other matters

1. Parties must not make unreasonable or excessive requests for information.
2. Parties must not request and are not required to disclose—
 - (i) personal and private information;
 - (ii) culturally sensitive information;
 - (iii) commercial in confidence information, legal advice or confidential communications.
3. Where reasonably requested by the persons to be consulted and is practicable—
 - (i) meetings should be held in the area of the proposed activity;
 - (ii) interpreters and/or translated material be provided;
 - (iii) information be provided in plain English or with plain English explanatory notes including the use of simplified technical terminology and supporting material such as diagrams and maps that are clear and easy to understand.
4. The proponent must seek, and respond to, advice relating to how a person being consulted prefers to be consulted, including the most effective means by which they can state or explain their position. This advice may reflect cultural protocols which must be respected where practicable.
5. Proponents should acknowledge and clearly explain how information gathered through the consultation process will be incorporated into the decision-making process.
6. Parties must use their best endeavours to provide information as reasonably requested, in relation to—
 - (i) the identification and characteristics of any ACH in the area of the proposed activity;
 - (ii) the activity including preferred method for carrying out the activity;
 - (iii) any feasible alternative methods for carrying out the activity; and
 - (iv) potential harm to ACH and why that harm cannot be avoided and/or minimised.
7. Parties must use their best endeavours to agree as to how the consultations should be documented. Consultation documentation may include—
 - (i) signed minutes of meetings;
 - (ii) audio or video recordings; and
 - (iii) summaries endorsed by the parties.
8. Where the parties cannot agree, the proponent must make a clear record of the consultation undertaken, respecting and incorporating where practicable the views of the party being consulted.

The record must include—

- (i) the date, time and method of each consultation offered and undertaken;
 - (ii) details of information provided by the proponent and any responses received;
 - (iii) details of any information provided by the party consulted; and
 - (iv) the reasons why agreement as to documentation of the consultation could not be reached.
9. Where practicable, proponents should provide flexibility around scheduling consultation, including methods of consultation.
 10. Where those being consulted have reduced capacity due to other commitments or resource limitations impacting their availability:
 - (i) they must inform the proponent as soon as possible and use their best endeavours to limit the impact of the commitments or limitations on their availability;
-

- (ii) the proponent must use their best endeavours to accommodate such commitments or limitations in the consultation being undertaken.
11. Where an activity is substantively changed (other than in response to the views of the persons to be consulted), including but not limited to location and scale, a proponent must offer to the persons to be consulted an additional two meetings, so that any amendments can appropriately be considered by the persons being consulted.
 12. Where practicable, videoconferencing such as Microsoft Teams or Zoom should be made available.
 13. Separate consultation sessions may be undertaken as appropriate.

Consultation framework

A proponent must give due consideration to any reasonable request for consultation, in addition to the three meetings referred to above, to be undertaken.

Where the parties agree to additional consultation being undertaken, the parties may agree on a consultation framework as the appropriate mechanism to manage that further consultation, having regard to—

- (i) the nature, scope and complexity of the proposed activity and extent of the potential harm to ACH;
- (ii) the requirement on the proponent to take reasonable steps to identify, and obtain an understanding of the characteristics of, the ACH located in the area to which the Plan is to relate [s. 141]; and
- (iii) the persons being consulted having an opportunity to clearly state and explain their position on the proposed activity.

The need for a consultation framework will need to be considered and agreed on a case-by-case basis and is not a mandatory requirement. Where there isn't a LACHS, a proponent may seek to agree on a consultation framework(s) with the native title party and with any knowledge holders.

Where the parties agree on the need for a consultation framework—

- (a) the parties are to use their best endeavours to agree on a framework having regard to the matters set out in these guidelines;
- (b) the maximum period to agree on a framework is eight weeks from the date of the request, unless otherwise agreed;
- (c) the framework should address consultation timeframes, including any meetings required and expected response times to any reasonable requests (from either party);
- (d) the maximum period for a party to provide a substantive response is four weeks unless otherwise agreed.

Where not all the persons to be consulted have agreed or are party to a consultation framework, a proponent should, for the period covered by the consultation framework, provide updates on any relevant changes to the proposed activity, including any changes to the method the proponent intends to use to carry out the activity, to those persons to be consulted who are not party to a framework and provide them with an opportunity to state their position in relation to those changes. Where the proponent has email details for knowledge holders, an update sent via email is sufficient.

The consultation framework may be updated as required by agreement.

Related documents

These guidelines relate to the following documents—

- Knowledge Holder Guidelines
- State Significance Guidelines
- LACHS (Fees) Guidelines
- ACH Management Code
- ACH Management Plan Form and Guiding Notes

Acronyms and definitions

ACH	Aboriginal cultural heritage
Act	<i>Aboriginal Cultural Heritage Act 2021</i>
Plan	ACH management plan
Department	Department of Planning, Lands and Heritage
ILUA	Means an indigenous land use agreement registered on the Register of Indigenous Land Use Agreements established and maintained under Part 8A of the <i>Native Title Act 1993</i>
LACHS	Local Aboriginal cultural heritage service
Native title party	In relation to an area, means— <ol style="list-style-type: none"> (a) a registered native title body corporate for the area; or (b) a registered native title claimant for the area; or (c) a person who was a registered native title body corporate for the area or a registered native title claimant for the area but—

	<p>(i) under an ILUA, has surrendered their native title rights and interests in respect of the area; or</p> <p>(ii) whose native title rights and interests in respect of the area have been compulsorily acquired or otherwise been extinguished;</p> <p>or</p> <p>(d) if the area is the subject of a settlement ILUA—a regional corporation in relation to that area.</p>
Native title representative body	<p>Native title representative body means—</p> <p>(a) a body that is recognised as a representative body under the Native Title Act section 203AD; or</p> <p>(b) a person or body funded under the Native Title Act section 203FE to perform all, or specified, functions of a body referred to in paragraph (a).</p>
Proponent	<p>Section 100. Terms used</p> <p>A person who—</p> <p>(a) intends to carry out an activity that may harm Aboriginal cultural heritage; or</p> <p>(b) carries out an activity authorised under Division 4</p>
Regional corporation	Has the meaning given in section 40 of the Act
Registered native title body corporate/claimant	Has the meaning given in section 253 of the <i>Native Title Act 1993</i>

Appendix A

Who should be consulted— Initial Contact	Follow up if no response to Initial Contact	Consultation (subject to alternative arrangements agreed between the parties)		
		Meeting 1 (two alternatives)	Meeting 2	Meeting 3
Each LACHS for the area or a part of the area	Where there is no response to the initial contact, further attempts at initial contact must be undertaken once per week for a minimum period of a further three weeks .	For the proponent to provide background, objectives and proposed outcomes of the project and an invitation to the second and third meetings.	For the persons to be consulted to be able to state and explain their position on the proposed activity, including the identity and characteristics of the ACH located in the area of the activity and how impacts can be avoided or minimised.	For the proponent to discuss how the views provided in the second meeting have been addressed as part of the preferred method for carrying out the activity.
If there is no LACHS for the area or a part of the area — each native title party and each knowledge holder for the area or the part of the area. If there is not a LACHS, native title party or knowledge holder—each NTRB for the area or the part of the area.	Where there is no response to the initial contact, further attempts at initial contact must be undertaken across a minimum period of a further 10 weeks as follows— <ul style="list-style-type: none">once a fortnight for the first the first eight weeks; thenonce per week for the remaining two weeks.			
		Parties may agree on an alternative consultation framework		

KNOWLEDGE HOLDER GUIDELINES

Commencement

The Knowledge holder guidelines come into effect on 1 July 2023.

Purpose

The Aboriginal Cultural Heritage Act 2021 (Act) recognises that some Aboriginal people hold knowledge and responsibilities for certain areas or specific Aboriginal cultural heritage (ACH).

These guidelines are about the identification of persons who are knowledge holders for an area [s. 294(c)]. The guidelines set out the steps for identifying each person who is a knowledge holder for an area so that the ACH Council (Council) or a proponent can notify and/or consult as required under the Act.

These guidelines are not about determining who does or does not have the right to be a knowledge holder but rather outlining the reasonable steps that are to be followed to identify who the knowledge holders are that are required to be notified or consulted under the Act.

For proponents undertaking a due diligence assessment, these guidelines only apply where a local ACH service (LACHS) has not been appointed.

Legislative Context

The Act defines a knowledge holder [s. 11] **in relation to an area** as an Aboriginal person who—

- (i) in accordance with Aboriginal tradition, holds particular knowledge about the ACH of the area; and
- (ii) has traditional rights, interests and responsibilities in respect of Aboriginal places located in, or Aboriginal objects or Aboriginal ancestral remains located in or reasonably believed to have originated from, the area.

Where the information is available, the Directory must contain prescribed information about knowledge holders for a particular area and/or particular ACH [s. 213]. The Council must ensure that the Directory is as accurate and up to date as practicable.

Scope

The Act sets out the persons to be notified or the persons to be consulted about a tier 2 or tier 3 activity that a proponent is carrying out, or a proposed activity that the proponent intends to carry out, in an area [s. 107]. Where there is a LACHS for an area or part of an area of an activity, a proponent is only required to notify or consult with the LACHS.

If there is no LACHS for the area or part of the area, a proponent is required to notify or consult 'each knowledge holder', which is defined as each person who is identified as a knowledge holder for the area or part of the area, 'after reasonable steps have been taken to do so in accordance with the knowledge holder guidelines'.

These guidelines set out the reasonable steps that must be taken, to identify each knowledge holder for the area or part of the area.

The guidelines also apply to the Council when it is required to notify knowledge holders—

- where it receives an application for an area to be declared a protected area [s. 75(1)(c)];
- where it forms the preliminary view that an area should be declared a protected area [s. 77(1)(b)(iii)];
- where it forms the view that ACH may be of State significance [s. 175(4)(c)]; and
- prior to making a recommendation about a prohibition order [s. 187(3)(c)(ii)].

Steps to identify Knowledge Holders

Step 1: Search the Directory and contact the appropriate parties

In order to identify the knowledge holders that are to be notified or consulted, the proponent and Council must first—

1. search the Directory to determine if there is a knowledge holder listed for the area; and
2. seek the advice of each native title party or, where there is no native title party, the native title representative body (NTRB), for the area; and
3. seek the advice of the LACHS for the area (Council only).

Definitions of 'native title party' and 'NTRB' are set out in Part 6 of these Guidelines.

Search the Directory

The Directory will identify the knowledge holder(s) for an area where that information is available.

The Directory may hold ACH records for an area to assist in identifying knowledge holders. It is recommended that a proponent or the Council review any such reports or files. When considering reports or files to identify knowledge holders, it should be noted that knowledge holders may not always have been identified or consulted as this was not a requirement under the *Aboriginal Heritage Act 1972*.

Contacting the native title party and/or NTRB

Each native title party for the area must be contacted for advice as to who the knowledge holder(s) is (are) for the area. If there is no native title party for the area, advice must be sought from the NTRB.

Where a response has not been received within a week of the request, a further request should be made. If a response is not received within a week of the further request, a proponent may move to Step 2.

Some knowledge holders may not be members of the native title party or be represented by the NTRB, therefore, after completing Step 1, a proponent must contact the Department of Planning, Lands and Heritage (Department).

When contacting the native title party or NTRB, the proponent must—

- advise that the request relates to identifying knowledge holders for the purpose of the Act;
- advise of the purpose of the request including the area to which the request relates; and
- provide contact details.

Details of where native title parties are located throughout the State are available on the Directory.

Contacting the LACHS—only applicable to the Council

In circumstances where a LACHS is established, the Council is also required to contact the LACHS for advice on which Aboriginal persons may be knowledge holders.

When contacting (as relevant) a LACHS, native title party or NTRB, the Council will need to—

- advise that the request relates to identifying knowledge holders for the purpose of the Act;
- advise of the purpose of the request including the area to which the request relates; and provide contact details.

Step 2: Seek advice from the Department

After completing Step 1, a proponent or the Council must contact the Department for advice as to the identity and contact details of knowledge holders for the relevant area.

When contacting the Department, the proponent and/or the Council must—

- (a) provide the names of any knowledge holders identified in Step 1; and
- (b) give details of the relevant area over which knowledge holders are sought; and
- (c) seek confirmation from the Department as to whether the information provided includes, in the opinion of the Department, the identity and contact details of **all** knowledge holders for area.

If the Department confirms that it has provided, in its opinion, the identity and contact details of all knowledge holders for the area, then Step 3 is not required.

Step 3: Public notice

If after completing Step 2, the Department confirms it cannot provide, in its opinion, the identity and contact details, of all knowledge holders for the area, the proponent or Council is required to give public notice to be published on a website maintained by, or on behalf of, the Council requesting other knowledge holders for that area to provide their contact details to the proponent or Council.

The public notice must give—

- (a) the name of the proponent and how the proponent or the Council can be contacted; and
- (b) details of the relevant area over which knowledge holders are sought; and
- (c) the opportunity for any knowledge holders for that area to provide their contact details, within a period of 2 weeks.

The proponent must contact the Department to arrange publication of the public notice.

The proponent is required to provide the identity and contact details of any knowledge holders identified in Step 3 to the Department.

Knowledge holders to be notified or consulted under the Act

A proponent or Council is only required to notify or consult with each knowledge holder who has been identified after completing Step 1, Step 2, and Step 3 (if required), and whose contact details are known to the proponent or the Council.

Related documents

These guidelines relate to the following documents—

- Consultation Guidelines
- Protected Area Order Guidelines
- State Significance Guidelines
- ACH Management Code
- ACH Management Plan Form and Guiding Notes

Acronyms and definitions

ACH	<p>Aboriginal cultural heritage</p> <p>(a) means the tangible and intangible elements that are important to the Aboriginal people of the State, and are recognised through social, spiritual, historical, scientific or aesthetic values, as part of Aboriginal tradition; and</p> <p>(b) includes the following—</p>
-----	---

	<ul style="list-style-type: none"> (i) an area (an <i>Aboriginal place</i>) in which tangible elements of Aboriginal cultural heritage are present; (ii) an object (an <i>Aboriginal object</i>) that is a tangible element of Aboriginal cultural heritage; (iii) a group of areas (a <i>cultural landscape</i>) interconnected through tangible or intangible elements of Aboriginal cultural heritage; (iv) the bodily remains of a deceased Aboriginal person (<i>Aboriginal ancestral remains</i>), other than remains that are buried in a cemetery where non-Aboriginal persons are also buried or remains that have been dealt with or are to be dealt with under a law of the State relating to the burial of the bodies of deceased persons.
Act	<i>Aboriginal Cultural Heritage Act 2021</i>
Council	Aboriginal Cultural Heritage Council
Directory	Aboriginal Cultural Heritage Directory
ILUA	Means an indigenous land use agreement registered on the Register of Indigenous Land Use Agreements established and maintained under Part 8A of the <i>Native Title Act 1993</i>
LACHS	Local Aboriginal cultural heritage service
Native title party	<p>In relation to an area, means—</p> <ul style="list-style-type: none"> (a) a registered native title body corporate for the area; or (b) a registered native title claimant for the area; or (c) a person who was a registered native title body corporate for the area or a registered native title claimant for the area but— <ul style="list-style-type: none"> (i) under an ILUA, has surrendered their native title rights and interests in respect of the area; or (ii) whose native title rights and interests in respect of the area have been compulsorily acquired or otherwise been extinguished; or (d) if the area is the subject of a settlement ILUA—a regional corporation in relation to that area.
NTRB	<p>Native title representative body means—</p> <ul style="list-style-type: none"> (a) a body that is recognised as a representative body under the Native Title Act section 203AD; or (b) a person or body funded under the Native Title Act section 203FE to perform all, or specified, functions of a body referred to in paragraph (a).
Regional corporation	Has the meaning given in section 40 of the Act
Registered native title body corporate/claimant	Has the meaning given in section 253 of the <i>Native Title Act 1993</i> .

PROTECTED AREA ORDER GUIDELINES

Commencement

The Protected Area order guidelines come into effect on 1 July 2023.

Purpose

The *Aboriginal Cultural Heritage Act 2021* (Act) recognises that some Aboriginal cultural heritage (ACH) is of outstanding significance and requires a declaration as a protected area. The purpose of declaring a protected area is to provide special protection from activities that may harm ACH. It offers the highest level of protection to ACH under the Act.

These guidelines set out the factors that will need to be considered when determining whether ACH is of outstanding significance for the purposes of the Act.

Scope

These guidelines assist knowledge holders to provide evidence in support of an application for ACH of outstanding significance to be declared a protected area by setting out the factors that must be considered by the ACH Council (Council) and Minister for Aboriginal Affairs (Minister) in determining whether ACH is of outstanding significance and in forming a view that a protected area should be declared.

Protected area requirements

Protected area orders

A protected area order may be declared in relation to ACH that is of outstanding significance to a knowledge holder, or knowledge holders, and where that significance is recognised through social, spiritual, historical, scientific or aesthetic values as part of Aboriginal tradition.

The purpose of a protected area order is to recognise that ACH of outstanding significance is located in the area and to provide special protection from activities that may harm that ACH. Once a protected area is declared, activities that may harm ACH cannot be authorised under Part 6 of the Act to be carried out within the area. This includes activities classified as exempt under the Act.

Applications cannot be made for ACH permits or ACH management plans to undertake activities within a protected area.

Activities that may harm ACH can only be undertaken in accordance with conditions on the relevant protected area order or in accordance with the *Aboriginal Cultural Heritage Regulations 2022* (Regulations), with the exception of Aboriginal people undertaking their traditional rights and responsibilities.

Application for a protected area

An application for a protected area **can only be made by a knowledge holder for the area** of the application who will need to provide evidence as to why the area is of outstanding significance. This evidence should consider the factors outlined at section 4.2.

Knowledge holders are not required to disclose any culturally sensitive information when making an application.

The application must meet the requirements set out in the Act including a description of—

- the application area, which can comprise several areas that are not contiguous;
- the characteristics of the ACH; and
- the outstanding significance of the ACH to the applicant or to a group or community of which the applicant is a member.

The Act provides a set of requirements if the application area includes an area to which a Permit or Plan relates.

Considering ACH is of outstanding significance

Considerations for outstanding significance

A knowledge holder should address at **least one of the following factors** in demonstrating that the ACH is of **outstanding significance** to either the knowledge holder or to a group or community, the members of which are knowledge holders for the ACH, acknowledging that in many instances there will be an intersection between different factors. The Council and Minister must consider these factors in determining whether ACH is of outstanding significance and in forming a view whether an area should be declared a protected area.

Factors

Community health

Where harm to the ACH has the potential to cause physical, emotional or spiritual harm to an individual, group or a community, particularly where there is a cultural obligation in accordance with Aboriginal tradition to prevent harm to the ACH.

This factor recognises that ACH, in accordance with Aboriginal tradition, can be central to the wellbeing of Aboriginal people and communities and that harm to ACH can result in harm to Aboriginal people themselves.

Sacred

Aboriginal sacred tradition includes, but is not limited to, Dreaming places, ceremonial grounds and other places, objects and cultural landscapes associated with sacred traditional customs and practices.

The Act does not require knowledge holders to disclose any sacred information, however, a knowledge holder may wish to provide details that provide a broad description, or context, of why a place is sacred or information about a sacred tradition or cultural practice without providing culturally sensitive information.

Educational potential

Specific ACH is used by Aboriginal communities for elders to pass on knowledge and educate younger members of the community in relation to both sacred and non-sacred traditional customs, practices and skills that are central to the cultural traditions of that community.

This may include education to ensure awareness and understanding of the ACH itself and how to ensure it is protected and preserved.

This factor recognises that Aboriginal culture and tradition is the oldest continuous culture in the world and that each generation is responsible for maintaining and passing that culture and tradition to the next generations. It recognises the importance of intergenerational equity through traditional customs, practices and skills being able to be handed down to future generations, particularly in the context of the displacement of Aboriginal people and impacts to ACH since European settlement and associated contribution to social inequity.

Contemporary usage

The ACH is central, or of fundamental importance, to the kinship systems or traditional customs, practices and skills of an Aboriginal family, group or community that continues to be practised.

Aboriginal kinship systems, customs and traditions still thrive and contribute to Aboriginal people, families and communities remaining strong and resilient by maintaining ongoing cultural practices and traditions related to the specific ACH.

Enhancing knowledge

The potential to meaningfully and significantly further understanding and knowledge of past use of Country and traditional customs, practices and skills.

This may include the potential to generate research outcomes that contribute to the continuity of culture and tradition that benefits or is important to Aboriginal people and/or the wider Western Australian community.

Uniqueness or rarity of ACH

A place or an object may be rare in, or unique to, a particular area. This may include rarity or uniqueness in the context of how Country appeared in the pre-European contact landscape.

While uniqueness or rarity will need to be considered in the context of the ACH in question, the broader context including the geographic area for which the place or object is rare or unique will also be taken into consideration.

Acronyms and definitions

ACH	<p>Aboriginal cultural heritage means the tangible and intangible elements that are important to the Aboriginal people of the State, and are recognised through social, spiritual, historical, scientific or aesthetic values, as part of Aboriginal tradition; and includes the following—</p> <ul style="list-style-type: none"> • an area (an Aboriginal place) in which tangible elements of Aboriginal cultural heritage are present; • an object (an Aboriginal object) that is a tangible element of Aboriginal cultural heritage; • a group of areas (a cultural landscape) interconnected through tangible or intangible elements of Aboriginal cultural heritage; • the bodily remains of a deceased Aboriginal person (Aboriginal ancestral remains), other than remains that are buried in a cemetery where non-Aboriginal persons are also buried or remains that have been dealt with or are to be dealt with under a law of the State relating to the burial of the bodies of deceased persons.
Act	<i>Aboriginal Cultural Heritage Act 2021</i>
Council	Aboriginal Cultural Heritage Council
Knowledge holder	<p>in relation to an area, means an Aboriginal person who—</p> <ul style="list-style-type: none"> • in accordance with Aboriginal tradition, holds particular knowledge about the ACH of the area; and • has traditional rights, interests and responsibilities in respect of Aboriginal places located in, or Aboriginal objects or Aboriginal ancestral remains located in or reasonably believed to have originated from, the area; and <p>in relation to ACH, means an Aboriginal person who—</p> <ul style="list-style-type: none"> • in accordance with Aboriginal tradition, holds particular knowledge about the ACH; and • has traditional rights, interests and responsibilities in respect of the Aboriginal cultural heritage.
Permit	ACH permit

Plan	ACH management plan
Regulations	<i>Aboriginal Cultural Heritage Regulations 2022</i>

STATE SIGNIFICANCE GUIDELINES

Commencement

The State significance guidelines come into effect on the 1 July 2023.

Purpose

One of the objects of the *Aboriginal Cultural Heritage Act 2021* (Act) is to recognise the value of Aboriginal cultural heritage (ACH) to Aboriginal people and to the wider Western Australian community. State significance, in relation to ACH, means that the ACH is of exceptional importance to the cultural identity of the State [s. 100].

In recognising the value of ACH to the State, the Act ensures that activities that may harm ACH are appropriately managed. The Act does this to provide balanced and beneficial outcomes for Aboriginal people as well as the broader Western Australian community.

These guidelines set out the factors that must be considered by the ACH Council (Council) in determining whether ACH is of State significance.

Overview

The Council will need to consider whether ACH is of State significance when there is an application for approval or authorisation of an ACH Management Plan (Plan) or an application to amend an approved or authorised Plan¹.

Where the Council determines that ACH is of State significance, the Plan under consideration can only be authorised by the Minister for Aboriginal Affairs (Minister). This includes where the parties have reached agreement on the terms of a Plan. The Minister may impose specific conditions to avoid or minimise the risk of harm to ACH of State significance.

Legislative Context

The process for determining whether ACH is of State significance [ss175-176] is—

1. The Council, in considering the application for a Plan or amendment to a Plan, forms a view that the ACH may be of State significance.
2. The Council must give public notice and notice to specified persons that it is considering making a determination that the ACH is of State significance, including providing details of the ACH and the area in which it is located, and an opportunity for submissions.
3. The Council must, within the prescribed period, consider any submissions and make a determination that the ACH is or is not of State significance, taking into consideration the factors set out in these guidelines.
4. If the Council determines the ACH to be of State significance, it must refer the Plan to the Minister to decide whether to authorise the Plan.
5. In making a decision, the Minister must consider the interests of the State [s. 11], which includes—
 - (a) the social or economic benefit of the State, including for the social or economic benefit of Aboriginal people; and
 - (b) the interests of future generations.

Scope

This document sets out the factors the Council must consider in determining whether ACH is of State significance as part of the approval or authorisation process for a Plan.

Determination of State significance

Why is State significance assessed?

ACH that is of State significance is ACH of exceptional importance to the cultural identity of the State. ACH found to be of State significance is important to understanding the story of Western Australia—its history, identity and its people. It is important to note, however, that this does not mean that ACH that is found to be of State significance is more important than ACH that is important only to Aboriginal people; rather, ACH of State significance is being recognised for different factors.

How State significance is established

The Burra Charter: the Australia ICOMOS Charter for Places of Cultural Heritage Significance 2013 (Burra Charter), provides guidance for the protection, conservation and management of cultural heritage places, including ACH, and recognises the fundamental importance of ACH to Aboriginal people and the wider community. The Burra Charter Practice Note Understanding and assessing cultural significance Version 1: November 2013 provides guidance on cultural significance and its assessment, including for the assessment of ACH. The values outlined in the Burra Charter have been adapted for the purpose of these guidelines.

In addition, the Council may determine that ACH is of State significance taking into consideration the following—

- the application for a Plan and supporting information;

¹ Further guidance on how Plans should be developed, including who should be consulted, is contained in the ACH Management Code and the ACH Management Plan Form—Guiding Notes.

- submissions made in response to the public notice.

Threshold for ACH Demonstrating State Significance

When considering whether ACH is of State significance, the Council will consider whether ACH demonstrates **exceptional** importance to the cultural identity of the State in relation to one or more of the following factors that have been adapted from the Burra Charter values—

- Aesthetic
- Historic
- Scientific
- Social.

Identifying factors

Aesthetic

Aesthetic does not simply rely on a common perception or most popular view. There is a need to consider aesthetics as understood by different cultural and community groups in terms of what is considered aesthetically pleasing or artistic. Aesthetic value can also refer to the sensory and perceptual experience, such as sounds and smells, which can impact the way ACH is experienced by evoking strong feelings or special meanings.

Aesthetic value may be demonstrated—

- through creative or artistic excellence, innovation or achievement;
- in terms of setting, including landmark quality or impact on important vistas.

Historic

Historic considers the value of ACH to the wider story of Western Australia. ACH demonstrating this value may be the site of an important or significant event, phase, movement, or activity in the State's history, or may be associated with a notable person or cultural group. Historic associations should be strong and verified by evidence.

Historic value may be demonstrated through—

- the density or diversity of cultural features illustrating the human occupation of the State, or for demonstrating patterns in the development of the State;
- association with an event, phase or activity of significant historic importance;
- close association with an individual or cultural group whose life, works or activities have been significant within the history of Western Australia.

Scientific

Scientific is considered by the potential to contribute to a further understanding of the natural or cultural history of Western Australia and is commonly used to assess the significance of identified, or potential, archaeological deposits.

Scientific value may be demonstrated through—

- the potential to provide information/archaeological material contributing to a wider understanding of the natural or cultural history of Western Australia, by virtue of its use as a research site, educational site, type locality, reference or benchmark site.
- demonstrating technical innovation or achievement.

Social

Social refers to the ties that ACH has, and the meanings that it holds, for a particular community or for the Western Australian community as a whole. ACH may be symbolic or landmark and contribute to a community's sense of place and cultural or social identity and may have contemporary associations and uses such as education. It can relate to both tangible and intangible elements.

The ties, meanings and associations will generally be held very strongly and able to be demonstrated satisfactorily to others and related to the present day rather than have historical value only.

Related Documents

The following documents support these guidelines—

- The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance, 2013
- Practice Note—Version 1: Understanding and assessing cultural significance (Australia ICOMOS, November 2013)
- ACH Management Code
- ACH Management Plan Form and Guiding Notes

Acronyms and definitions

ACH	<p>Aboriginal cultural heritage</p> <p>(a) means the tangible and intangible elements that are important to the Aboriginal people of the State, and are recognised through social, spiritual, historical, scientific or aesthetic values, as part of Aboriginal tradition; and</p> <p>(b) includes the following—</p> <p>(i) an area (an Aboriginal place) in which tangible elements of Aboriginal cultural heritage are present;</p>
-----	--

	<ul style="list-style-type: none">(ii) an object (an Aboriginal object) that is a tangible element of Aboriginal cultural heritage;(iii) a group of areas (a cultural landscape) interconnected through tangible or intangible elements of Aboriginal cultural heritage;(iv) the bodily remains of a deceased Aboriginal person (Aboriginal ancestral remains), other than remains that are buried in a cemetery where non-Aboriginal persons are also buried or remains that have been dealt with or are to be dealt with under a law of the State relating to the burial of the bodies of deceased persons.
Act	<i>Aboriginal Cultural Heritage Act 2021</i>
Council	ACH Council
Department	Department of Planning, Lands and Heritage
LACHS	Local ACH Services
Minister	Minister for Aboriginal Affairs
